United States Court of Appeals

for the Second Circuit

APPENDIX

74-1422

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

Docket No. 74-1422

THOMAS PALERMO,

Petitioner-Appellant

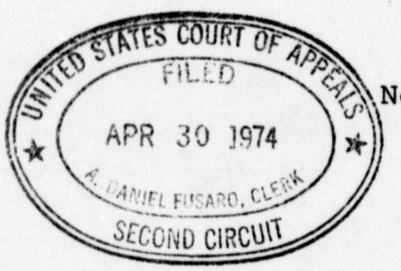
- v -

HON. LEON J. VINCENT,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPELLANT'S APPENDIX



JAMES O. DRUKER
600 Madison Avenue
New York, New York 10022
Attorney for Appellant

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Submitt' May 21, 1973 A-1

E.D.N.Y. Form 3
(Rule 26 5-24-65)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Thomas Palermo #18024
Full name and prison number (if any) of Petitioner

vs.

Hon. Leon Vincent
Name of Respondent

Case No. 73C 844
(Clerk to supply)

Petition for Writ of Habeas Corpus by Person in State Custody

INSTRUCTIONS—READ CAREFULLY

To be considered by the District Court, this petition must be in writing *(legibly handwritten or typewritten)*, signed by the petitioner and verified *(notarized)*. Answers to each applicable question must be concise. If the space is too small for the answer to a particular question, finish it on the reverse side of the page or insert an additional blank page, making clear to which question the continued answer refers.

Every petition for habeas corpus must be sworn to under oath. A false statement of a material fact in the petition may be made the basis of prosecution and conviction for perjury. Petitioners should take care that their answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information that will establish whether petitioner will be unable to pay the fees and costs of the habeas corpus proceedings.

When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the District Court for the Eastern District of New York.

1. Place of detention Green Haven Correctional Facility, Stormville, N.Y.

2. Name and location of court which imposed sentence Richmond County Supreme Court St. George, Richmond County.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

   (a) 46/1968 Robbery 1st degree, Grand Larceny 2nd degree

   (b) ---

   (c) ---

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) June 27, 1969 0-25 & 0-7 Concurrent

   (b) ---

   (c) ---

5. Check whether a finding of guilty was made

   (a) after a plea of guilty ---

   (b) after a plea of not guilty X

   (c) after a plea of nolo contendere ---

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

   (a) a jury X

   (b) a judge without a jury ---

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7), list

   (a) the name of each court to which you appealed:

i. Appellate Division, Second Department

ii. New York State Court Of Appeals

iii. ---

(b) the result in each such court to which you appealed:

i. Unanimously Affirmed

ii. Unanimously Affirmed

iii. ---

(c) the date of each such result:

i. May 24, 1971

ii. April 25, 1973

iii. ---

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. No Opinion

ii. Opinion by Gabrielli, J. Citation unknown

iii. ---

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully: Conviction denied petitioner due process and equal protection in that:

(a) The in-court identification was tainted and influenced by an inherently suggestive out-of-court identification procedure which singled out relator as the person who should be identified.

(c) Prosecutor's inflammatory and prejudicial statements regarding matters not in evidence deprived relator of an entitled fair and impartial trial.

(b) He was denied a fair and impartial trial by the Court's arbitrary act of binding and gagging him which operated to preclude him from conferring with counsel and compelled him to be a witness against himself.

The complained of gagging violated relator's right not to be subjected to cruel and unusual punishment.

(over)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The evening of the robbery two detectives and the victims went to New York City Police Headquaters to review modus operandi photographs. They identified a Nicholas Giglio and petitioner as the robbery team. At this time, from the photo identification they were 90 per cent sure petitioner was the robber, but wanted to see him in person to be 100 per cent sure. On this occasion they turned the photos over learning petitioners name, height, weight, hair color, eye color, as well as other pertinent information appearing on the back of these police photos.

(Continued insert 4 A)

(10 Continued)

(d) The failure of the People to introduce the requisite proof for a first-degree robbery resulted in a conviction devoid of the evidentiary support mandated by New York Statute and by the U.S. Supreme Court in Thompson v. City of Louisville (362 U.S. 199) and Greggory v. Rits of Chicago (394 U.S. 111)

(11 A Cont.)

Several days later, the detectives learned where petitioner was living, and that he was free on bail from several counties. They also learned at all times in question, Nicholas Giglio was an inmate of a penal institution.

There was no Wade - Gilbert identification compliance procedure at Police Headquarters. The same detectives, on different occasions escorted both victims to Courts in the Bronx and Queens for the purpose of identifying the suspects who they already identified in the photos. They were unsuccessful. On March 8, 1968 the same group went to a Court in Yonkers and while seated in the arresting officers automobile and waiting for the suspects to come out of a Yonkers office building the victims, identified the suspects and they were arrested.

There was never any attempt made to advise petitioner, that he was a suspect in a crime as serious as this; that he was to be viewed; or of any of his rights. The only logicial reason for not arresting petitioner, or ascertaining if he would voluntarily stand in a line-up, in bringing the witnesses from Staten Island to Courts in Queens, Bronx and Yonkers, was to show not only that petitioner had a prior record, as was obvious from the modious operandi file, but that he was presently engagged in criminal activity as shown by him being on bail in several counties. In addition, there were conversations concerning the case in the travels back and forth from the various Courts.

Immediately, before the trial there was a Wade - Gilbert identification hearing. The court held that the procedures used did not taint the in-court identification of the co-defendants, although Chief Assistant District Attorney Ralph DiIorio, stipulated:

"Mr. Di Iorio: 'I would stipulate that under the circumstances here, that upon the victim or victims acknowledging that a photograph looked like one of the perpetrators, that at that point the defendant could have been taken into custody by the detective --

"The Court; That is not what is --

"Mr. DiIorio; --and a line-up procedure followed in accordance with Wade. However, in this case, that procedure was not followed.

"The Court: Mr. DiIorio; there is only one thing we want clarified on the record. Mr. Evseroff contends that one of the procedure safeguards, or the greater part of the procedural safeguards promulgated by United States against Wade, and Gilbert against California, were not complied with by the prosecution. That is, he says that, first, there was never any notification given to the defendant Palermo.

"Mr. DiIorio: Right

"The Court; That he was going to be viewed by any alleged victim, or by anybody, for that matter, and that he had a right to counsel to represent him at such viewing. Secondly, he contends that there was never a formal lineup such as is meant generally by the word 'lineup.' There was no array of persons standing still, which would be unsuggestive to com-

(11 aCont.)

plainants, at which time the complainants looked at the defendant Palermo. There was no such line-up. You concede that that is so?
"Mr. Dilorio: Yes, I concede that is the Fact."
(Wade hearing 195 - 196)

No excuse was offered by the People to justify a deliberate variance from the Wade - Gilbert standards.

The Court's decision, permitting the in-court identification was against the weight of credible evidence, and a violation of the due process standard of "Simmons". Though the Court did find the in-street identification of petitioner "did not conform to the standards established in Wade and Gilbert" yet, it omitted to find that this confrontation tainted the in-court identification.

(11 b Cont.)

The error was compounded when the judge in answering these objections, on several occasions, stated; "The District Attorney is reasoning from established evidence." and "The District Attorney, I assume, is arguing from fact which he believes has been established.", although at no time was any evidence offered by the people or does it appear anywhere in the record that petitioner was a "professional", professional robber", or that Rackover was a fense or MacAluso a bought cop. The judge not only permitted these comments over objection, but added credence to them by the statements he repeatedly made above.

During the People's summation, numerous objections were made by petitioner's counsel, when the court requested the ADA to stop his summation and ordered: "Just a moment, please. Now, there must be absolute silence at the counsel table." The trial transcript indicates that the Court's direction was proceeded by an interest detracting factor at the defense table:

"Defendant Palermo confers with Mr. Evseroff in an audible tone)."

No exception was taken by defense counsel to the Court's direction that "there must be absolute silence at the counsel table." Petitioner inquired: "I can't talk to my lawyer? He is afraid of me here, I can't talk to my lawyer? I have to stand here and watch myself be framed?"

The judge threatened: "You will be bound and gagged if you continue. Now you be quiet."

Palermo retorted: "I don't want to sit here and be frame d."

The judge again threatened: "You will be bound and gagged on one more outburst, Mister, one more."

Palermo replied: "You didn't give me a fair trial throughout the whole trial."

The trial judge, addressing the court attendants, ordered: "Get a gag, will you please?"

Following the imposition of the gagging order Palermo uttered an inexcusable vituperative remark which was directed at the Court.

Petitioner was bound and gagged for several minutes during which time petitioner's attorney and the judge engaged in a conversatio n leading to petitioners promise to remain absolutely quiet and the gag was

(Cont. Insert 4C)

(11 b Cont.)

removed. The above action took place before the presence of the entire jury, and no attempt was made at any meaning curative instruction. additionally, there wasn't sufficient provaction to warrant such extreme treatment of the accused.

At the time of sentense, four months after the jury verdict, the trial judge recalled for the benefit of new counsel what had transpired at the time Palermo was gagged, and the rationale for his actions. The court conceded, in substance, that petitioner was not disorderly, disruptive or obstreperous during the trial and that there were no interruptions by petitioner other than the isolated incident.

Theoretically petitioner was bound and gagged even after the restraint implements were removed by the Court securing petitioner's promise of "absolute silence" at the defense table.

It is note worthy that during petitioners trial he became suspect in a $4 million dollar Queens County jewelry robbery. On information and belief, at this time, the court, prosecutor, petitioner's counsel and others, began negotiations seeking the return of the property in question. (See, Palermo v Rockefeller 70 Civ. 3705 S.D.N.Y.) The Richmond prosecutor was instrumental in having MacAluse suspended from his job the morning he was to testify at petitioners trial for conduct unbecoming an officer. The prosecutor was aware petitioner's alibi witness, MacAluso, was not officially ~~susp~~ suposed to be working on the day he issued the summons; that the summons were issued out of there consecutive number order; and that the summons were not filed until a few days before petitioners trial, although issued 13 months previously. Petitioner had no way of knowing any of this information.

Petitioner realizes he is responsible for any testimony elicted from his witnesses, but how can he be held responsible for what an officer of New Jersey did or did not due with respect to his official duties? Petitioner had the right, and indeed was bound to accept in good faith a presumption of regularity in relation to his alibi witness, and his duties as a New Jersey Motor Vechile Officer. The only one aware of MacAluso's irregularity and deriliction of duties was the Richmond prosecutor and he did not come forward with this information. It is obvious, if petitioner's alibi witness had acted properly in accordance with his duties petitioner would have been acquited, and this case would appear an obvious case of mistaken identification. Further if petitioner did not have the misfortune to get arrested at this time, it would not have been important to anyone what MacAluso did ~~xx~~ or did not do with respect to his duties. It was not until petitioner made known his defense that MacAluso was charged with any wrong doing.

Petitioner did not offer any alibi until several days before his trial. You will recall he was arrested several months after the perpetration of the crime and, did not recall where he was on the day in question. His wife in cleaning some drawers found the summons and noticed

(Cont. insert 4 D)

(11 b Cont.)

they were issued on the day petitioner was to have been doing the robbery. Had the police arrested petitioner as soon as he became suspect of the crime, it is possible , he would have remembered where he was on the day in question, and his alibi, and any irregularity in MacAluso's duties might have been prevented. It is to be remembered any irregularity by MacAluso only became important after petitioner offered this as his alibi.

Interestingly the Richmond prosecutor calls petitioner a professional and then goes on to say how the robbers stayed in the house in full view of the victims for the period of over an hour. This in spite of petitioner having a previous record. Of further interest, when petitioner made a deal for the return of the jewelry stolen from Provident, Queens County Captain of Detectives John O'Connor in a passing conversation said "we know you didn't commit the Richmond robbery, the M.O. isn't yours. You always covered your face in some respect even before your first conviction. Why would you allow these people to look at you undisgusid for over an hour, this just isn't your way." Or words to this effect.

(11 c Cont.)

As the law now stands petitioner was tried under the applicable laws of September 1, 1969, although he went to trial in February 1969. The proof of this is the change in the statute. Incidently with the change in the law came an affirmitive defence which petitioner was effectively prevented from using if he so choose to use. It is notable that the way the law now stands if I had been convicted within the jurisdiction of the first department rather then the second department I could only have been convicted for the maximum crime of robbery second degree, a crime punishable by imprisonment with a maximum of 15 years.

(b) In summation the District Attorney failed to refrain from undue involvement in the presentation to the jury of highly prejudicial remarks. Throughout the summation, over defense objection, the District Attorney consistently refers to petitioner as a "professional" and "professional robber". Petitioner never took the stand and no basis existed for bring out his prior criminal record.

The prosecutor referred and insinuated that defense witness, Rackover, was involved with petitioner in dealing with stolen jewelry and was in fact a fense.

When referring to Leonard MacAluso, a New Jersey Motor Vechile Officer and alibi witness, the prosecutor implys that MacAluso is an"interested witness" and that he "was approached" and in receipt of a "pay off", a bought cop. These assertions were permitted over objection, although no basis existed in fact or on the record. These statements and accusations go beyond the purview of fair comment on the evidence.

(Continued insert 4 B)

(c) The requiste proofs necessary to establish the crime of robbery first degree were not met. The trial Court submitted to the jury the crime of robbery in the first, second and third degrees. It attempted to define the meaning of a dangerous instrument under Penal Law Sec. 160.15 (3). The trial Court was in error as a matter of law. The Appellate Division:First Department in People vs Iglesias, 337 NYS 2d 740 (unofficial) unanimously modified on the law by reducing the degree of the crime, robbery in the First degree to robbery in the Second Degree and by remitting the matter for resentence on the grounds that there was no proof that the gun was loaded or that it was used. It held that the new Penal Law 160.14 (3) requires more than mere possession of a dangerous weapon to establish a crime of robbery in the First Degree. The Court noted the amendment to Penal Law Sec. 160.15, added a 4th subdivision dealing with the situation where a gunis merely displayed. Subdivision 4 became effective on September 1, 1969, after the completion of the trial below.

(Cont. insert 4 D)

12. Prior to this petition have you filed with respect to this conviction

(a) any motion in State court for a new trial? No

(b) any petition in State court for a writ of error *coram nobis* or any motion in the nature of *coram nobis*? No

(c) any petitions in State or Federal courts for habeas corpus? Yes

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(e) any other petitions, motions or applications in this or any other court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof: Habeas Corpus - Westchester County - Alleged loss of jurisdiction resulted when I was turned over to New Jersey authorities without benifit of extradition proceedings.

i. ---

Habeas Corpus - S.D.N.Y. 70 C 4143 Frankel, Loss of jurisdiction resulted from broken sentence promise.

ii. ---

Habeas Corpus - Westchester Co. transferred Dutchess Co. Same allegations as appeared in S.D.N.Y. habeas application.

iii. ---

Habeas Corpus - E.D.N.Y. 72 C 1267 (Dooling J.) Broken promise - State denying petitioner an effective appeal.

iv. ---

Civil Rights petition S.D.N.Y. 70 C 3705 (Griesa, J.) Broken Contract, Conspiracy

(b) the name and location of the court in which each was filed:

i. Westchester County Supreme Court, White Plains, N.Y. Southern District Court, Foley Square, N.Y. ---

ii. Dutchess County Supreme Court, Poughkeepsie, N.Y. Eastern District Court, 225 Cadman Plaza East, Bklyn, N.Y. ---

iii. Southern District Court, Foley Square, N.Y. ---

iv. ---

(c) the disposition thereof:

i. Dismissed -- Appeal affirmed Dismissed -- Failure to exhaust state remedies. Probable Cause denied. ---

ii. Pending refered back to origional Court ---

iii. Pending sub judice ---

iv. Pending awaiting an available trial date ---

(d) the date of each such disposition:

i. December 6, 1972; May 7, 1973 ---

ii. June 23, 1971 December 11, 1972 ---

iii. ---

iv. ---

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. All the grounds set forth in 10 supra

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. Appeal to Appellate Division: Second Department

ii. Appeal to New York State Court Of Appeals

iii. _____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)

(b)

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Jacob Evseroff 186 Jerolemon Street Bklyn, N.Y.
Edward Bobick 149 West 72 Street New York, N.Y.

ii. Hyman Bravin 6 East 45 Street New York, N.Y.

iii.

(b) the proceedings at which each such attorney represented you:

i. Evseroff Richmond Trial

ii. Bobick Richmond sentencing and Queens deal

iii. Hyman Bravin appeal in both appellate division and the Court of Appeals: Also on a motion and hearing to withdraw my guilty plea in Queens County.

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

Thomas Palermo
Signature of Petitioner

State Of New York
County of Dutchess } ss

Thomas Palermo being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Thomas Palermo
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

21st day of May (month), 1973 (year)

Esmond W. Gifford Sr.
Notary Public

My commission expires

ESMOND W. GIFFORD, SR.
NOTARY PUBLIC, State of New York
(month) (day) in Dutchess County (year)
Commission Expires March 30, 1975

FORMA PAUPERIS AFFIDAVIT
(see instructions, page 1 of this form)

Thomas Palermo, being duly sworn deposes and says:

That I am the plaintiff in the above entitled proceedings; that i support of my motion to proceed without being required to prepay fees, costs, or give security therefore, in the prosecution of this action because of my poverty.

I have not received any income from a business, profession, or ot form of self-employment, or in the form of rent payments, interest and dividends in the past 12 months; nor do I own any cash or checking/saving account real estate, stocks, bonds notes, or automobiles.

I believe in good faith that I am entitled to the relief I am seeking.

Thomas Palermo
Signature of Petitioner

State Of New York
County Of Dutchess } ss

Thomas Palermo, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Thomas Palermo
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

21st day of May (month), 1973 (year)

Esmond W. Gifford, Sr.
Notary Public

My commission expires

ESMOND W. GIFFORD, SR.
NOTARY PUBLIC, State of New York
(month) Residing in Dutchess County (year)
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS PALERMO,
Petitioner

-v-

HON. LEON VINCENT, Respondent

NOTICE OF APPEAL
73 C 344

Notice is hereby given that Thomas Palermo, Petitioner above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of this Court, Hon. John F. Dooling, Jr., entered on February 14, 1973, denying the petition for a writ of habeas corpus and dismissing same.

Petitioner contends that, for the reasons set forth in his brief submitted in the above captioned matter, he was denied a fair trial in accordance with State and Federal due process standards, wherefore this Honorable Court erred as a matter of law in denying the writ and dismissing the petition.

James O. Druker
600 Madison Avenue
23rd Floor
New York, New York 10022
Attorney for Thomas Palermo

cc: Attorney General
State of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel.
THOMAS PALERMO, :

Petitioner, : 73 C 844

- against - : CERTIFICATE of PROBABLE CAUSE

LEON J. VINCENT, :

Respondent. :

- -x

Treating Petitioner's notice of appeal as a request for a certificate of probable cause, a certificate of probable cause for appeal in this matter is granted this day pursuant to 28 U.S.C. §2253, and the Clerk is directed to transmit the file forthwith to the United States Court of Appeals for the Second Circuit for their consideration.

Petitioner's address is:

Mr. Thomas Palermo #18024
Drawer B
Stormville, New York 12582

As Petitioner was financially unable to afford to retain a lawyer, counsel was appointed to represent Petitioner under the provisions of the Criminal Justice Act. Counsel's name and address is:

James O. Druker, Esq.
600 Madison Avenue

PPI—55—3-17-72—30M—0153

New York, New York 10022

Counsel is willing to continue on appeal under the provisions of the Criminal Justice Act.

The following state court records were used in deciding this petition:

> the two-volume transcript of the trial and Wade hearing; and
>
> the briefs of appellant and respondent in People v. Palermo before the New York Court of Appeals.

These records are in the court's possession and the Clerk is directed to transmit them, together with the file, to the United States Court of Appeals for the Second Circuit.

It is so ORDERED.

Brooklyn, New York
February 28, 1974

U. S. D. J.

Summation-People

AFTER LUNCHEON RECESS

(At 1:02 p.m. both defendants are seated at counsel table.)

(At 1:04 p.m. Jury enter Jurybox; Court ascends the bench at 1:05 p.m.)

THE CLERK: Case on trial, continued. All appearances the same. Defendants are present with their attorneys. Jurors, please answer to your names.

(The roll of the Jurors was called, each noting his presence.)

THE CLERK: Fourteen Jurors answer present.

THE COURT: All right, Mr. DiIorio.

* * *

CLOSING REMARKS IN BEHALF OF THE PEOPLE: (1:06 p.m.)

MR. DI IORIO: If it please the Court, Mr. Evseroff, Mr. Smith, Mr. Foreman and Gentlemen of the Jury. This is the final word as far as counsel are concerned in this case, and as was pointed out to you previously, the Prosecution has the last say. And rightfully so, because as you will recall during the initial phases of this proceeding, you were advised and told that the Prosecution has the burden of proof throughout the entire trial, and the burden is that of proof

beyond a reasonable doubt, and that is primarily the reason why the People have the final word in a trial.

Now, I might point out preliminarily that a trial of a defendant or defendants charged with crime is nothing more, nothing less than a simple search for truth. A trial is what is commonly characterized as an adversary proceeding, and this type of proceeding is designed to whittle away at evidence, to bring evidence before you, and to put it through the refining process of an adversary proceeding, where a defendant has the right to cross-examine, where the People have the right to cross-examine witnesses, and so forth. And the ultimate objective, and ultimate hope of attorneys on either side of a picture is to find the ultimate truth, so that a proper decision can be made.

Now, this has been a rather protracted trial. This is only the second week, I believe -- yes, we started the trial actually with a preliminary on Thursday, three Thursdays ago, so that tomorrow will be the conclusion of two weeks of actual trial in this particular case. Now, as I pointed out initially when I was questioning the Jurors with

respect to their qualifications, the Grand Jury of Richmond County, on March 25, 1968, handed up an Indictment charging these defendants, Palermo and Saltzman, in a four-count Indictment, charging robbery in the 1st Degree, robbery in the 2nd Degree, Grand Larceny in the 3rd Degree, and in the fourth count, Grand Larceny in the 2nd Degree.

Now, I am not going into detail as to essential elements of the various crimes charged. The Court will take care of that in its Charge which will be delivered to the Jury tomorrow morning. Suffice it to say that the Indictment is simply the charge, as was pointed out by defense counsel. The Indictment does not constitute proof. The only proof you will concern yourselves, Gentlemen, is the proof that was elicited, or the testimony that was elicited from the mouths of the witnesses who testified, together with all of the exhibits that were offered and received in evidence.

Now, this crime alleged to have been committed by these two defendants is a serious, a very serious crime, as you men can well realize. The Prosecution produced five witnesses. We produced Mrs. Bonopane, We produced Mrs. Ariosta, we produced the daughter-in-law, the daughter-in-law of Mrs. Ariosta, whose

name is also Ariosta, and the two detectives who testified to whatever the Police procedures were which were involved in this particular case.

Now, I might say at this time that this robbery of which there is no dispute -- there is no dispute at all in this record that a robbery was in fact committed on the 28th day of January, 1968 somewhere in the vicinity of 2:30 p.m. at this address on Alter Avenue in this County. Now, if you analyze the procedure that was followed by the perpetrators of this crime, it will strike you immediately that this was a highly professional job. This was not a crime committed by novices. This was a crime committed by professionals in a highly professional manner.

You heard the testimony of Mrs. Bonopane who told you under oath that on the 27th of January, the Saturday preceding the Sunday when the crime was committed, she received a telephone call, ostensibly from a person who was interested in buying real property. And an appointment was set up for the next day, and you will recall that these ladies were involved in business, they were partners in a gasoline station which is possibly the greatest distributor of gasoline, retail gasoline

in the County.

MR. EVSEROFF: Objection.

THE COURT: Yes, the objection is sustained. There is no testimony in this record as to the volume of business by this place, nor is it of any consequence.

MR. DI IORIO: Right. Now, the next day is Sunday. You recall Mrs. Bonopane received a telephone call at around noontime, and the same voice was on the other end of the telephone, and advised her that he was on his way to Chicago, and wanted to pass by the house for the purpose of securing particular information in relation to the business transaction which he represented he wanted to discuss with Mrs. Bonopane. And then you will recall that at around 2:30 p.m., or thereabouts, the doorbell sounded, and the only ones home at the time were Mrs. Bonopane and Mrs. Ariosta.

Now, you will recall that Mrs. Bonopane answered the door, and there at the door were two men, well dressed, one carrying an attache case, and giving the appearance of two respectful citizens, two men interested in consummating a legitimate transaction. Now, this was a rather clever ruse on the part of the perpetrators to gain entrance into the house for

the purpose of carrying out their design to rob and plunder.

Now, when they got inside the place, to further fortify the fact that these were real professionals, they came into the house, sat down, and before you know it, the guns are drawn and then the introduction of rubber gloves, which of course a good robber knows is a very, very useful implement in his trade, because by using rubber gloves there is dissipated the possibility of fingerprints ever being detected by the Police in a post-crime investigation.

Now, you will recall that the defendant Saltzman sat on the couch next to Mrs. Bonopane. And I might say parenthetically in passing that you had the opportunity of observing Mrs. Bonopane as well as her sister, Mrs. Ariosta. You had the opportunity of determining for yourselves the type women they were, their grade of intelligence, their demeanor, their forthright answers. And this all goes, of course, in your job as Jurors in determining whether or not a particular witness is telling the truth or lying. Now, I submit to you that the appearance of these women, their backgrounds, their age, their intelligence is one which would lend itself to you

as a situation involving persons who would not come here deliberately to Court to lie, and thereby cause an innocent person or persons to be convicted of a crime as grave and as serious as the one charged here.

Now, you will recall that the defendant Saltzman was seated on a couch next to Mrs. Bonopane, and across from Mrs. Ariosta, in close proximity to one another. You will recall that the room was well lighted by the outside light coming in through large windows. You will recall that the defendant Saltzman sat in the same position in the presence of these women for a solid hour or hour and ten minutes. Now, an hour or an hour and ten minutes is a long time, in point of time, in point of the ability of a person to recognize features and so forth.

You will recall that the defendant Palermo was seated with the women for a period, and then he was on his way throughout the house, ravaging the house, so to speak, in his search for loot. And you will recall that in connection with Palermo, I introduced into evidence various photographs which show the interior of the house, one of which indicated the area in which the victims and the defendant Saltzman were seated (showing). It also shows the wide

archways which were visible from the seat at which they were located during this hour or hour and ten-minute interval, and I put these pictures into evidence to illustrate that the house was more or less a wide open situation, so that if a person was wandering around the first floor, he could be easily seen by a person or persons sitting in the situation demonstrated by People's Exhibit One, which is lettered to indicate the position of the various individuals at the time the defendants first entered the house.

Now, as was pointed out to you previously, the principle contention, or the principle factor or feature in this case was the question of identification. This is not a robbery such as a purse snath where the victim sees a person momentarily. In other words, for a moment or two. Here is a situation where you have two women, two intelligent women, having under their scrutiny two individuals for a period of an hour or more. I think the outside limit was an hour and ten minutes. And it is incredible to think that they did not have a very, very good opportunity to view the face or faces of the suspects, or the defendants.

Now, as was pointed out to you by Mr. Evseroff,

you have got to apply everyday standards to testimony that you listen to. You have got to apply your good, common sense in evaluating the truth or falsity, or the accuracy of testimony which was given to you from the witness stand. As a Jury composed of 12 individuals who will ultimately decide this case, the total intelligence, or the aggregate intelligence of 12 men is far greater than mine, or the Court's or defense counsel, or anybody in this Courtroom. Because as you listen to the testimony that is elicited from the witness stand, if one of you fails to remember a particular detail, it is almost a sure bet that one of the others, one or more of the others will remember it. And in that connection it might be stated that your recollection is the thing that is determinative of the evidence that has been produced during the course of this trial. And if I, during the course of my summation say something which is not quite accurate, it is not done so deliberately, but in any event, if I say something that might be inaccurate and not consistent with what has been developed here, you Jurors will certainly remember what was said or what did transpire during the course of the trial.

Summation-People

Now, Mr. Evseroff, in his summation, indicated that this job, or this robbery must have been committed by a local person or local persons for the reason that they appeared to have a decided familiarity with the fact, for example, that there was a safe in the house, and that there were business receipts in the house from the gasoline station. Now, I submit this, that there was a fingerman in this situation, without a question. There was undoubtedly a local individual who fingered that particular job, and of course the information that the local had transmitted to the perpetrators, so that when they entered the house, they showed great familiarity with the situation that confronted them when they got into the house, when they came into the house.

Now, with respect to this subject matter, it seems that if the individuals who committed this job were locals, it would be a rather risky business for a local visitor or individualist to commit a crime of this type, because of the fact that if they were locals, they would be more easily identifiable. Now, --

MR. EVSEROFF: Your Honor, I must respectfully object as not being fair comment on the evidence.

THE COURT: Objection overruled.

MR. DI IORIO: Now, the fact that these defendants live in Queens, were not Islanders on this set of circumstances, fortifies my contention that this job was in fact done by outsiders, that the fingerman was in fact a local individual. And I might say in passing, that it would be a wonderful thing if we could ascertain the identity of the fingerman and bring him to bar, to the bar of justice. But of course, as sometimes happens, the perpetrators of crime are not always apprehended.

Now, you will recall that on the evening of the 28th Detectives Corbett and McAloon accompanied the two women, Mrs. Ariosta and Mrs. Bonopane, to Police Headquarters in Manhattan for the purpose of viewing photographs in what is commonly known as an M.O. file, modus operandi file. You will recall that both of the women testified that they were kept separate and apart from one another. You will recall that both detectives testified similarily that they instructed these women not to communicate with one another in viewing these photographs.

You will recall that Mrs. Bonopane, in going through a batch of photographs that were given to

her, came upon a picture which she immediately identified and recognized. You will recall that at the time she came across this picture, she had gone through about 150 pictures. She slid it out, and showed it very surreptitiously to Detective Corbett, so as to obivate the possibility that this picture might be identified by her sister solely because of the fact that it was identified by Mrs. Bonopane.

Now, with respect to the other photograph, there has been much said about the fact that this other photograph was that of the other perpetrator. And both Mr. Evseroff and Mr. Smith have made much of the fact that this photograph of the second person, whose name was Giglio, was in fact picked up by there women as the second perpetrator in the commission of this robbery. Now, you will recall that both women testified to this effect in this connection, or in this regard. They testified that the photograph of Giglio was a photograph which contains certain features which corresponded with certain features of the defendant Saltzman. As I recall it, they brought out the hairline, and they brought out, or pointed out to the detectives the type hair that this person

Giglio had in the photograph, which resembled the hairline and the hair of the second perpetrator, who was later identified as the defendant Saltzman.

Now, the events concerning or surrounding the identification of the photographs, and the fact that these persons were not recorded on a wanted card, or was not officially recorded so that they could be apprehended, is a credit in my opinion to the care that both the Police Department exercised in this situation, and the care which the women exhibited in this situation. The women told the detectives very, very plainly and bluntly that although they were ninety-nine per cent sure of the identification of the photograph of Palermo, they still felt that they wanted to see him in person in order to fortify, or verify the identification. And I think that instead of criticism at the fact that these persons were not arrested immediatly upon the identification of the photographs, I think it is a credit to the honesty and integrity of both the Police officials involved in this investigation, and the victims of the crime.

Now, Mr. Evseroff made a big issue of the fact that the identification that was made in

Yonkers, New York, was a result of the fact that these women had seen a photograph or photographs previously of the perpetrators, and he attempts to convince you that the identification made in Yonkers was as a result of their having previously seen a photograph or photographs of the perpetrators, which, from a standpoint of human experience, just does not jibe. The identification in Yonkers, you will recall, was made on March 8th, 1968, a period of about five weeks after the commission of this crime, so that it might be said that it was relatively a recent identification, and for a to reason that the identification made of Saltzman and Palermo in Yonkers was based upon the victims' viewing of the photograph, rather than the fact that the victims had actually looked at these persons physically for a period of one hour in a very, very confined atmosphere, and a well-lighted atmosphere, is absolutely ridiculous.

Now, with respect to the alibi offered by the defendant Palermo, Officer Macaluso. Now, his testimony was rather incridible, and of course that is putting it mildly. Here is a trained Police Officer who testifies that he issued, or served a summons on a person in Lodi, New Jersey,

on the 28th of January, 1968. He mislaid the summonses which he retained as copies, official copies which should have been filed with the Clerk of the Municipal Court. And lo and behold, the summonses do not turn up for a period of almost thirteen months after the service of these particular summonses. Now, that fact, coupled with other facts, would indicate that this testimony offered by the defendant Palermo by Patrolman Macaluso was very, very suspect.

Now, the defensive alibi is what is regarded as a perfect defense, of course assuming that the alibi can be established, on the theory that a person cannot be in two places at the same time. And here we have a situation where the crime was committed on Staten Island and the summons was given in Lodi, New Jersey, a distance of about 20 miles intervening between both locations. So that if the defendant Palermo were in fact in Lodi, New Jersey, at the time and on the date when the summons was issued, of course it represents a perfect defense to this charge which he has stood trial for.

Now, in evaluating the validity of an alibi defense, you have the right to look into all of

the circumstances surrounding the creation, or the formation of this alibi. You have a patrolman who conducted himself, under the circumstances, in a highly irregular way. He served a summons which in sequence was previous, or prior to the summonses which were served, allegedly served on the defendant Palermo about a month, almost a month after the alleged service of the summonses made allegedly on Palermo. Now, that is a discrepancy, and this case seems to me to be full of discrepancies and coincidences.

You take the summonses themselves which are marked Defendants' Exhibits E and F, and if you examine these summonses you will note at the very outset that the word Bergen County is misspelled. Now, here is an officer who lived for many, many years in the County of Bergen where the town of Lodi is located, and he doesn't even know how to spell the word Bergen. He spells it B-E-R-G-A-N, and of course we all know that Bergen is spelt B-E-R-G-E-N. Now, I don't know what significance you might attach to that, but it is just one of a series of things that he did in connection with the service of this summons, which makes it look very, very suspect. Could it be that when he wrote

these summonses out he was in a highly nervous state because of the fact that these summonses might have been written up at a time other than the time indicated, and written up to serve a purpose which was not completely legitmate?

MR. EVSEROFF: Your Honor, I am going to object to that. That is not a fair comment on the testimony.

THE COURT: Mr. Evseroff.

MR. EVSEROFF: Yes, your Honor.

THE COURT: Yes, the objection is overruled.

MR. DI IORIO: Now, these two summonses which were produced belatedly by the defendant Palermo --

MR. EVSEROFF: Objection; belatedly.

THE COURT: Yes, strike out the word belatedly.

MR. DI IORIO: These two summonses, it has been testified, were issued on January 28, 1968, over thirteen months ago, have the appearance of newness. In other words, if you examine these two summonses, they do not give the appearance of two pieces of paper which have been laying around for a period of over a year. I just say that in passing for your consideration. You have a right, under the law to draw fair inference from the evidence produced, and from the statements made by witnesses.

Summation-People

And these summonses are as much a part of this trial as the photographs or anything else that has been introduced and received in evidence, or anything that has been said by witnesses.

Now, I am sort of jumping here and there in this, I am not maintaining a sequence of events, and I would like to jump to another subject matter at this point. The summons book which was offered and received in evidence as being identical to the summons book from which these summonses were extracted before they were served on the defendant Palermo, or allegedly served on the defendant Palermo.

You will note that this summons book has two covers. The back covers made up into two parts (showing), and the obvious purpose of this extended portion of the back of the summons book is so as to separate the summonses, the top summons from the one immediately following it, in this fashion (showing), and you will note also -- I will bring that back again. You will note also that the summons which is served, the cardboard summons which is served on the violator, is extended before the bottom of the copies which were retained by the Police Officer, so as to facilitate the flipping of the top without interfering with the

one immediately following it. And of course the back is designed to separate them, and then the officer proceedes to write the summons, and at the conclusion of his writing of the summons, he simply flips the top three copies, tears out the summons to be served on the violator and that is it. Now, when this is torn out, this portion, the back portion, or the back flap is still in position, and all he does then is finger the bottom of the next succeeding summons, flip it up and he goes through the same process until he completes the summons book and turns in his summons, or summonses to the Clerk of the Municipal Court.

Now, Macaluso testified that when he issued the summonses to Palermo on the 28th of January, 1968, he extracted the copy which he served upon him, or the copies, rather, because there were two summonses served, and he then proceeded to extract the originals, that is the three copies which he retained for his own records. Now, that does not seem to jibe with the physical setup of this book. Actually, if he left those alone and kept them in the book, there would be no possibility of a summons, or an isolated summons being mislaid. But he testified in this particular instance, and

it would appear to me that it would be a violation -- not a violation, but an irregularity to extract the summons before finishing the book. It just does not jibe with reality.

Now, that is another discrepancy with his testimony. He testified that the summonses were made returnable on February 6, 1968, which is about a week, a little over a week from the time of the issuance of the summons, and when he went to Court that day he had other cases pending before the Municipal Court. And he testified that he was aware of the fact that these summonses which he had served on Palermo were not answered by the defendant. He did not appear in Court. And he did nothing about that.

Now, he said that he had mislaid the copies, although he still had the summons book, and those copies should have been retained in the summons book. He said he had the summons book on March 8th when he served a summons, the number seven summons upon a person by the name of Paterson.

Now, there is another discrepancy in the story. First of all, the discrepancy in the sequence of serving the summons, the issuing of the last digit ending in seven, after the issuing of summons eight

and nine, allegedly served on Palermo on January 28th.

Now, there is another discrepancy. If you recall, this trial actually got under way on Monday, the 17th of this month, and here is another coincidence in this strange fabrication of testimony. On the 17th of February, when this trial started, when the Jury selection started, this summons, the original summonses which he had retained, were found by him in the process of moving and were then filed with the Clerk of the Municipal Court. Very, very strange circumstance.

Now, of course it must be remembered that in alibi testimony there is always a question that the person who is offering the alibi might be wrong on the date or the time. But going back to my original assumption that this particular robbery was committed by professionals, you have the pat situation here of summonses being produced, allegedly served in Lodi, New Jersey, on a particular date, at a particular time. How pat can an alibi be?

You might say, what was the purpose of bringing in a letter by testimony, fortified by summonses, when it could have been done just as easily without any reference to summonses. They

could have brought Macaluso here. He could have testified to the effect that on January 28th, sometime in the early afternoon of that date, he saw the defendant, Palermo, in the City of Lodi. But in any event, in order to make this defense absolutely letter perfect, they produced these summonses which specify the date when they were served and the time, and of course the time would necessarily would have to coincide with the time of the alleged commission of this crime. Too pat, it is a situation which strikes me as being just too pat. And consistent with the type of a situation which you might consider contrived by professional robbers.

Now, it was brought out that if there was a fabricated defense, this alibi defense was fabricated, why wouldn't they have put Saltzman in the car instead of this fellow Rackover? Well, now, if you analyze that a moment, you might come to this conclusion. If the alibi brought into this trial by Palermo were established, that is firmly established, the case would automatically be out the window so far as he was concerned. And if that did develop, if his alibi really stood the fires of examination and inspection, you could

very well reason that the women were incorrect or wrong in the identification of Palermo, and therefore their identification of Saltzman must necessarily fall. So all that Saltzman has to do is sit back and place the burden on Palermo, and if Palermo's defense succeeds, he is out automatically as well. Because it is reasonable to assume that if the women were wrong in respect to one identification, why, it would cast out upon the other identification as a matter of logic. So that when you think about the fact that they could have put Saltzman in the car, when you analyze it, that might have appeared too pat. And the reasoning on the part of a professional would be to work this thing out in such a way that it isn't too incredible.

Now, I am not going to dwell any further on Macaluso. You had the opportunity of observing his conduct on the stand. You had the opportunity of evaluating his testimony. You heard his fantastic story about serving the summonses on the 28th. You observed his demeanor. You noted that after his testimony was completed, he sat in the Courtroom as an interested spectator, and it appeared to me that his interest in this trial went far beyond that of a simple alibi witness.

MR. EVSEROFF: Your Honor, I object to that on the ground that that is not a fair comment on the evidence.

THE COURT: Objection is overruled.

MR. DI IORIO: Now, in that connection, he sat in the Courtroom at the conclusion of his testimony, and you will remember this when Rackover testified, he was able to point him out from the witness stand and say, "That's the officer who gave Palermo the ticket over a year ago." Now, there again that is incredible. But the point I make, aside from the fact that it was an incredible identification, the fact that the opportunity was made available to the witness Rackover to make an in-Court identification of the very officer who allegedly gave Palermo the summons on January 28th.

Now, getting to the testimony of Rackover. Rackover testified that he was a friend of Palermo's even to the extent where in the past years he has invited him to his home on four or five different occasions. You will recall that. You will recall that he first met him about ten, nine or eight years ago. And he met him in connection with the sale of a particular piece of jewelry that Palermo wanted for his wife. And he said that that was the start of

what turned out to be a long friendship.

Now, he testified that in the past five years he had Palermo and his wife visit him and his wife at their home in East, or West Meadow, I forget just what town it was. But he pointed up the fact that these things happen because of their close relationship. You will recall that toward the end of my cross-examination of Rackover, I asked him a series of questions designed to determine how close a relationship this in fact was. You will recall I asked him, "Can you state, Mr. Rackover, whether you saw Palermo at least once during the year 1959?" He said he couldn't do it. Then I went on to 1960, I went on to 1961, I went all the way through to 1967, and I asked him the identical question. And when I reached 1967 I again asked him, "Can you state, Mr. Rackover, that you saw Mr. Palermo at least once in 1967?" And you will recall that his answer was no, he did not recall.

Now, that brings me to this question of friendship and close association. The trip, the trip that he allegedly made from Palermo's home in Queens to Pennsylvania was on January 28, 1968. Now, just a month previously was the end of the year 1967, and you will recall that he could not state that

he had seen Palermo even once during 1967.

Now, he received a phone call, allegedly from Palermo, who wanted Rackover to drive him to Pennsylvania to visit an aunt, and Rackover testified that when he received the phone call he had some kind of a virus. But in any event, he got out of his house and into his car and drove to Palermo's house, and honks the horn. Palermo came out, he got out of his car and into the rear. Palermo got behind the wheel, and Rackover got into the rear and fell asleep.

Now, if you analyze that composition, it seems to me that the friendship between two persons which would permit one of them to call up on a Sunday a man who works all week and ask him to drive him hundreds of miles to a location in Pennsylvania, is strange credulity. I mean, who would have the nerve, the audacity, the forwardness to do a thing like that, unless the relationship, as I said before, was a very, very close one? And I submit to you that the testimony given by Rackover in this connection was far from convincing in that record.

Now, a further fact that I would like to bring out to you is this. If Rackover were that

closely associated with Palermo and he was in fact sick when Palermo called him, to drive him to Pennsylvania, why wouldn't he have said to Palermo, "Here, take my car, you drive to convenience yourself, and when you are through with your trip, bring it back. I am too sick, I want to stay home today. Today is Sunday, I have been working all week "? If you look at this situation as reasonable men, and attach to it the everyday common sense that you exercise everyday of your lives, you would realize that this story smells a little fishy.

Something else I would like to bring out. It is alleged here that Palermo committed the robbery. That would brand him as a robber, if proven beyond a reasonable doubt. Now, isn't it a strange thing that there should be a relationship between a man alleged to have committed a robbery involving the theft of jewelry, and this fellow Rackover, who was involved in the very same business? You will remember --

MR. EVSEROFF: Objection.

THE COURT: Objection is overruled.

MR. DI IORIO: You will remember that Rackover testified that he has a little stand, or a showcase

on the ground floor of the jewelry exchange on the Bowery in New York City, and that he has a little factory on the second floor where he manufactures, where he fabricates settings for diamonds and so forth and so on. And he also testified, of course, that he can disassemble jewelry.

Now, what more perfect companion, what more perfect companion can a robber have than a man involved in that kind of business, where jewelry is stolen --

MR. EVSEROFF: If your Honor please, at this time I respectfully move for the withdrawal of a Juror and a declaration of a mistrial, on the ground that the statements made by the District Attorney are so highly prejudicial and not based on any evidence in the case, as to preclude my client of the possibility of receiving a fair trial.

THE COURT: Motion is denied.

MR. EVSEROFF: Respectfully except.

THE COURT: The District Attorney is referring to testimony given by the witness Rackover, and he is reasoning from that testimony. The Jury will be instructed, of course, that they will have the right to draw such reasonable inferences as they

see fit to draw, based upon established facts. The District Attorney, I assume, is arguing from fact which he believes has been established.

MR. EVSEROFF: Would you hear me, your Honor?

THE COURT: No, Mr. Evseroff. You have an exception. Please continue.

MR. DI IORIO: Now, in evaluating the witnesses that testify at a trial, you have to determine, try to determine where their interests lay, what motives might they have to lie, to distort the truth, and after you have established these conditions in your mind, you are better able then to determine where the truth lies.

Now, take the testimony of Mrs. Bonopane and Mrs. Ariosta. What possible motive would they have, these two women who exercised so much caution at the outset, in putting the finger on Palermo and putting the finger on Saltzman as the perpetrators of a crime as serious as this? They did not know Palermo or Saltzman from a hole in the wall prior to January 28, 1968.

Now, getting to the Police Officers, the two detectives, Corbett and McAloon. What possible motive could they have to apprehend these two defendants? What possible motive could they have,

except the performance of good Police work? You heard them testify that they exercised extreme caution in this vital area of identification, so that there would not be any slipups. They had nor more desire to apprehend a person, an innocent person than the women.

Now, getting down to Rackover and this Patrolman, or this Officer Macaluso, who incidentally is not regarded as a policeman in the true sense. His title is Motor Vehicle officer. His only function in his duties as such are to apprehend, or give tickets out to violators in the area of vehicular traffic control.

Now, what possible motive could Macaluso have, for example, to distort the truth, we will say? Is it possible that sometime after March of 1963 someone approached --

MR. EVSEROFF: Objection. No such testimony in this record, if it please the Court. It is not a fair comment on the evidence.

THE COURT: Mr. Evseroff, please let me rule.

MR. EVSEROFF: Yes, your Honor.

THE COURT: The objection is overruled.

MR. EVSEROFF: If your Honor please, I respectfully move for the withdrawal --

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THE COURT: Yes, you have an exception, your motion is denied.

MR. EVSEROFF: I have another application.

THE COURT: The District Attorney is reasoning from established evidence.

MR. EVSEROFF: I have another application, your Honor.

THE COURT: Yes?

MR. EVSEROFF: I respectfully move for the withdrawal of a Juror and a declaration of a mistrial.

THE COURT: Your application is denied.

MR. EVSEROFF: Respectfully except.

THE COURT: You have an exception.

MR. DI IORIO: Now, when we evaluate the actions of Macaluso, and the strange circumstances surrounding the issuance of these two traffic summonses, we must come to the conclusion that there is something rotten in the State of Denmark. Now, what would be thepurpose, what would be the motive behind these actions which are so highly suspect? Could it have been a payoff of some kind? Could he have been --

MR. EVSEROFF: If your Honor please, I respectfully move for the withdrawal of a Juror and a declaration of a mistrial.

THE COURT: Motion denied.

MR. EVSEROFF: If your Honor please, I object to the characterization, could there have been a payoff. There is no such testimony.

THE COURT: Objection is overruled.

MR. EVSEROFF: Exception.

THE COURT: The District Attorney is reasoning and arguing from what has been established by fact --

MR. EVSEROFF: That hasn't been established, your Honor. There has been no testimony here as to a payoff.

THE COURT: The District Attorney is arguing now. He is reasoning as to possible motives which might be ascribed to the conduct of the Police Officer. That is for the Jury to determine. Go ahead.

MR. DI IORIO: Now, I don't stand here accusing Macaluso of anything. Macaluso is not on trial. The persons on trial are Palermo --

(Defendant Palermo confers with Mr. Evseroff in audible tone.)

THE COURT: Just a moment, please. Now, there must be absolute silence at the counsel table.

DEFENDANT PALERMO: I can't talk to my lawyer? He is afraid of me here, I can't talk to my lawyer. I have to stand here and watch myself be framed?

THE COURT: You will be bound and gagged if you continue. Now you be quiet.

DEFENDANT PALERMO: I don't want to sit here and be framed.

THE COURT: You will be bound and gagged on one more outburst, Mister, one more.

DEFENDANT PALERMO: You didn't give me a fair trial throughout the whole thing.

THE COURT: Get a gag, will you please?

DEFENDANT PALERMO: And you were a graft taker as a lawyer.

THE COURT: Get a gag, please.

DEFENDANT PALERMO: Get anything you want. I can't get a fair trial. You don't give my attorney half a chance.

THE COURT: Mr. Foreman, Gentlemen of the Jury, please pay no attention.

DEFENDANT PALERMO: Pay attention to everything that's prejudicial. You wouldn't even let me approach the bench when I wanted to talk to you.

THE COURT: Gag the defendant.

MR. EVSEROFF: If your Honor please, I respectfully except.

THE COURT: You have an exception.

(Accordingly, Defendant Palermo is gagged.)

THE COURT: Now, I will remove that gag if he promises to be absolutely quiet. Counselor, it is your duty to ask him if he will be quiet, or does he prefer to remain gagged.

(Mr. Evseroff confers with Defendant Palermo.)

THE COURT: Is he going to continue his outbursts, or will he be quiet?

MR. EVSEROFF: If your Honor please, I respectfully object to this.

THE COURT: You had your objection and your objection is overruled, Mr. Evseroff.

MR. EVSEROFF: If your Honor please, I respectfully object to your Honor yelling at me.

THE COURT: You have an exception.

MR. EVSEROFF: Respectfully except.

THE COURT: Now, Mr. Evseroff --

MR. EVSEROFF: If your Honor please, I have another application. At this time I respectfully move for a withdrawal of a Juror.

THE COURT: Motion is denied.

MR. EVSEROFF: Respectfully except.

THE COURT: Mr. Evseroff.

MR. EVSEROFF: Yes, your Honor.

THE COURT: Will you ask your client if he will be quiet and permit these proceedings to continue,

or does he intend to make gratuitous statements?

(Mr. Evseroff confers with Defendant Palermo.)

MR. EVSEROFF: He says, "I'll be quiet," Judge.

THE COURT: All right. Please continue, Mr. DiIorio.

(Gag is removed from Defendant Palermo.)

MR. DI IORIO: Now, as I said before, Macaluso is not on trial, Rackover is not on trial, I am not on trial, Mr. Evseroff is not on trial and Mr. Smith is not on trial. The ones who are on trial are Palermo here and his cohort, Saltzman, or his co-defendant, Saltzman. But you have a right, as has been indicated all along, to draw fair inferences from the evidence adduced during the course of this trial.

Now, with respect to Rackover. What would his motive be in coming forward and testifying to an alibi for this defendant Palermo, who we said was such a close friend, but who it developed was not such a close friend? What would his motive be in trying to sell you a bill of goods to the effect that he is a close friend of Palermo, when his testimony indicates that he could not even testify that he saw him once during all of the years that I took him through at the end of my cross-examination?

Could it have been a profit motive?

MR. EVSEROFF: If your Honor please, I respectfully object to that as not being an accurate statement of the testimony.

THE COURT: What is that?

MR. EVSEROFF: I respectfully object to that as not being an accurate statement of the evidence.

THE COURT: Objection is overruled. Mr. Foreman, and Gentlemen of the Jury, you have been told more than once, you will be told again, as you are now, if Mr. Evseroff made an inaccurate statement with regard to any testimony in the case, disregard his statement. If Mr. DiIorio now makes an inaccurate statement with regard to any testimony presented, disregard that statement. If Mr. Smith, during his summation, made an inaccurate statement with regard to any testimony which was presented, disregard that statement. It is for you to determine what was said by a witness, and what was not said.

I know you understand it, Gentlemen, because I told you that more than once. Anything said by counsel as to the testimony given by any witness, if it does not jibe or agree with your recollection, you may disregard what counsel has stated. And so it will be in my charge to you tomorrow morning.

Summation-People

If during my charge I should make a statement as to any testimony which was given by any witness, if the statement which I make with regard to testimony does not agree with your recollection of that testimony, you disregard my statement, and accept your own. That is the law.

MR. DI IORIO: Now, is it possible that Palermo was able to unload the loot from this job with a fellow like Rackover --

MR. EVSEROFF: Your Honor --

MR. DI IORIO: A perfect drop for the fruits of a crime of this type?

MR. EVSEROFF: If your Honor please, this is no inference based on the evidence.

THE COURT: Mr. Evseroff, I will charge the Jury, as you know, as to the motives of all witness who testify. Jurors have a right to consider the testimony of every witness, have a right to determine whether or not a witness is interested or disinterested, and in attempting to arrive at a conclusion as to whether or not any witness is an interested witness or a disinterested witness, Jurors have a right to inquire, to reason, from evidence which they believe establish facts as to whether or not any witness has a motive in fabricating the truth,

in fabricating a story, or distorting the truth.

MR. EVSEROFF: Absolutely.

THE COURT: Yes.

MR. EVSEROFF: That is one hundred per cent --

THE COURT: A basic proposition of law.

MR. EVSEROFF: Absolutely, but the inference that he just drew is not based on any testimony in the case.

THE COURT: He is talking now about possible motives of witnesses. He is arguing, Mr. Evseroff, he is reasoning, and he has a right to do that. It is for the Jury, as I have already told the Jury. If they accept his reasoning, they may accept it, and consider it. If they do not accept his reasoning, they reject it. That is basic.

MR. EVSEROFF: Your Honor, must he not make inferences based on the evidence in the case?

THE COURT: Please continue, yes.

MR. EVSEROFF: Is that not the law?

THE COURT: Yes. I have overruled your objection, Mr. Evseroff.

MR. EVSEROFF: Respectfully except.

THE COURT: Yes, please continue.

MR. DI IORIO: Now, you recall that Rackover testified that it was some Sunday in January, 1968

when he received this call from Palermo to drive him to Pennsylvania. He did not say the 28th. He did not have to. He did not have to. If these summonses were actually given out on the 28th of January, 1968, the testimony showed that these were the only summonses, these were the only summonses allegedly issued by Patrolman Macaluso during the course of that month, that if Rackover said January, 1968, it would necessarily have to narrow down to the 28th. And of course it would sound more credible if Rackover took the stand and said, "Oh, yes, I remember the 28th day of January, 1968 very vividly, I know that that is the specific date, and that is the specific time." He did not have to, because such testimony, such accurate testimony based on recollection would have been highly suspect by you, and would have been suspect also to rather critical cross-examination.

MR. EVSEROFF: Your Honor, I am going to object to that as comment on what was not testified to in this case.

THE COURT: Objection is overruled. Please continue.

MR. DI IORIO: Now, if you recall, on cross-examination of Rackover he testified that the first

time he thought about this particular incident was last Thursday, when he was called by Mr. Evseroff to come to his office concerning a matter involving Palermo. Now, this, mind you, is thirteen almost fourteen months after this alleged incident involving the traffic summons. And he was able, without having thought about it for the entire year intervening, or fourteen months intervening, he was able to recollect in answer to Mr. Evseroff's questions at the office, that the ticket was given to Palermo in January of 1968.

Now, I asked him how the officer was attired at the time the ticket was given. Now, you will remember that he testified that he was in the presence, or in the area where the officer was involved in giving these summonses for about an hour. I asked Rackover what kind of a hat the officer was wearing, he could not remember. Now, I asked him this question specifically relating to the Sam Brown belt, because a Sam Brown belt is something which is really outstanding in a uniform of a military man or a Police Officer. And I asked him specifically, I said, "Did he have a Sam Brown belt on?" He did not know what a Sam Brown belt was. And I described it to him as a belt, a rather

wide belt going around the waist of the officer, and another strap going over the shoulder. It is a rather outstanding piece of equipment, and he could not remember that. But sitting in this witness chair he could recognize the officer sitting in the fourth row of the spectators' section in this Courtroom, after the intervening period of fourteen months.

Now, let us talk about the defendant Saltzman. Saltzman took the witness stand and testified to a prior clean record. He testified that he never had a weapon in his hand. He testified that he was never on Staten Island, and particularly on January 28, 1968. He testified that he first met Palermo on February 12, 1968 in, I believe he said, the City of Yonkers. Yes, the City of Yonkers. And then he testified that he was in the company of the defendant Palermo on March 8th when he picked him up in his vehicle, his motor vehicle, at Palermo's home, to take him to the City of Yonkers.

Now, it seems to me that the acquaintanceship was of rather short duration. February 12th to March 8th -- was it February 12th or later? It was sometime in February. I don't recall now, but your memory will be better than mine in that regard,

but he first met Palermo either on the 12th or on a subsequent date, I can't recall which. He had never seen him before in his life. Then on March 8th, which is a short time thereafter, he picked him up with his automobile at Palermo's home. Saltzman had his wife with him. Palermo came to the car with his wife, and there was a third couple whose identities were not disclosed. And they drove then to the City of Yonkers.

Now, up to this point there is apparently no inkling, nothing in Saltzman's mind concerning an alleged robbery which occurred in January of 1968 involving Palermo. When they get to the City of Yonkers, they are seen emerging from a building in the City of Yonkers, and shortly thereafter they are apprehended, both of them are apprehended by Corbett and McAloon. And they are charged then with a robbery which was committed on Staten Island on January 28, 1968. This presumably is the first inkling that Saltzman, the fellow with a prior, clean record, this fellow who, employed by a large insurance company, writing up insurance, this fellow who had previously employed in super markets, gasoline stations, going back to the time he left high school after his graduation, this is the first inkling now,

according to Saltzman, that Palermo is involved in a robbery which was committed on January 28th. And of course, Saltzman, according to his own testimony, did not know Palermo on January 28, 1968.

Now, this is an innocent man being unjustly accused of a crime which he never committed, and he is accused of having committed this crime in association with Palermo at a time when he did not even know Palermo. He must have felt at the time, if this is true, if his story is true, he must have felt at the time this is a case of mistaken identity as far as I am concerned, but I am not sure about Palermo, maybe he did commit this crime with somebody else --

MR. EVSEROFF: Objection.

MR. DI IORIO: And I am being accused of being that somebody else.

MR. EVSEROFF: Objection.

MR. SMITH: Objection.

MR. EVSEROFF: On behalf of Palermo, your Honor, I have to object. This is no inference from the evidence.

THE COURT: Your objection is overruled. Gentlemen, of course there is no evidence in this

record that such was the case. There is no such testimony. However, counsel on both sides, addressing the Jury in that phase of the proceedings referred to as summation, have the right to present arguments. They have the right to reason from evidence which was presented. Again I say to you, if you do not accept the reasoning of the District Attorney, you reject the argument. If you accept the reasoning, it is for you to consider it, if you want to consider it. But of course there is no such evidence in the record. That goes as to all reasoning, and those by counsel on both sides.

Counsel in this phase of the proceeding in presenting arguments, I say again, resort to the testimony and argument from such testimony, present arguments and draw inferences from what they consider to be established facts. If you agree with them, accept the argument. If you do not, reject it.

MR. SMITH: Will your Honor note for the record my objection to the remarks by the District Attorney?

THE COURT: Yes, the objection is overruled.

MR. SMITH: Exception, please.

THE COURT: Please continue.

MR. DI IORIO: If his story is true, this must have been his state of mind at the time of his arrest

with the defendant Palermo on March 8, 1968, because, further, on that date Palermo, to him, was almost a total stranger. He only knew him a couple of weeks at that point. And he had no way of knowing that Palermo was not in fact implicated in the commission of this crime.

Now, let us see what his actions are, or his conduct is thereafter. He testified, in answer to questions of mine on cross-examination, that he visited the home of Palermo with is wife. His wife and Palermo's wife became close friends. He visited Palermo's home with his wife on at least four or five occasions thereafter, after this arrest involving a crime such as robbery, when he is a complete innocent bystander. He also testified that Palermo visited his home on -- I forget on how many occasions, but you will remember the testimony better than I. Any time they had a Court appearance, they drove to Court together.

Doesn't it occur to you that this relationship between Saltzman and Palermo after this fact was rather unusual? If Saltzman were the innocent man that he protests to be, he would not have any more to do with Palermo than the man in the moon. This is the reasonable way of looking at the situation.

Why would he become a close friend of Palermo to the extent of visiting back and forth their homes, their wives associating together? Why? That is a question you will have to answer in your own minds when you go to your Juryroom before you reach a verdict. This is an important factor with Saltzman's protestations of innocence.

Getting back to Macaluso. You will recall that there was offered and received in evidence the various exhibits relating to his employment with the Motor Vehicle Bureau in the State of New Jersey, and I just wanted to point out to you that on the worksheet which is marked People's Exhibit 24, or attendance report, that on the day in question, that is on January 28th, when he allegedly gave these summonses to Palermo, it was his day off. You recall that portion of his testimony, very, very vividly, because it is so unusual for a public servant to work on his day off. A public servant, a man in Macaluso's position as a traffic enforcement officer, probably worked rather hard during the week, and it seems to me that for a man to come in on his day off gratuitously is a rather incredible situation.

Of course they had no way of changing the date

of the commission of this crime. This crime was committed on a Sunday, so that if an airtight alibi was going to be contrived, it had to be contrived on that date, and it fell on a Sunday, and the Sunday happened to be the day off of the patrolman who issued the summonses. Well, of course that is just one of those things, just one of those things that create a hole in an alibi defense. But those are the chances that a person takes when an alibi is fabricated.

Again with Macaluso. You will recall that he filed for the first time in the office of the Clerk of the Court in Lodi, he asked for the Clerk a summons to be served personally upon the defendant. And the summons of course was marked in evidence, People's Exhibit 28. On cross-examination he testified that they could have been mailed, but he did not mail them. But then it developed on re-direct he did. He said that he mailed a copy of the summons to Palermo, at his address, 106-03 Otis Avenue, in Corona, Long Island.

This is an inconsistent statement in response to a question that I developed, to the effect that he did not in fact mail anything to Palermo in an effort to ascertain his true address. But it did

develop then, later on, and this was a contradiction to his prior testimony, that he in fact mailed a copy of this summons, marked People's 18, to the address shown thereon, and that the letter in which the summons was enclosed was never returned. Then of course he testified that he made further effort by contacting the Post Office Department to ascertain the true address of Palermo, when up to that point there was no indication that this address to which he had mailed this summons was not in fact the true address.

Now, there was a great to-do about the fact that Detective Corbett, in his brief resume of the occurrence, indicated that there were two possible suspects, one Thomas Palermo, and one a fellow by the name of Giglio, who at that time was serving time in Attica State Prison.

Now, a very, very strenuous effort was made by both attorneys to indicate to you that the women in fact identified the photograph of Giglio as that second perpetrator, and if your recollection is as good as mine, and I know it is better, you will remember distinctly that the women testified to the effect that the photograph of Giglio was in fact not the photograph of the second perpetrator, but

simply had certain identifying features.

There again it is a forceful demonstration of the virtue of care in apprehending possible suspects in the commission of crime. Just assume for the sake of argument that Detectives Corbett and McAloon went out and arrested this fellow Giglio, assuming of course that he was free to be arrested, and we will assume Giglio was a man, a respectable citizen, and on the basis of this sketchy identification by these two women they apprehended an innocent man.

Now, wouldn't that be a horrible thing for a man to be arrested and charged with a crime of which he was perfectly innocent? And that is what I say, the care that was exercised by the women and by the detectives is illustrative of good police work and honest police work. There is nothing worse in this world than the apprehension, the arrest of an innocent man charged with a heinous crime.

Getting back to Macaluso. There was offered and received in evidence People's Exhibit 20, this folder --

MR. EVSEROFF: Your Honor, People's Exhibit 20 is one piece of paper in that folder, your Honor.

MR. DI IORIO: Yes, that is right, this is

People's Exhibit 23 --

THE COURT: One typewritten page. Is that right?

MR. SMITH: That is right.

MR. DI IORIO: Exhibit 20 is one typewritten page contained in Exhibit 23, which comprises a series of pages.

MR. EVSEROFF: I believe 23 is marked for identification only, not in evidence.

MR. SMITH: Exhibit 23.

MR. DI IORIO: That is right, you are right, 23, this folder is marked for identification, and it is marked People's Exhibit 23 to be more precise. But getting back to Macaluso again. Every page in this pamphlet, or folder, represents a letter, a copy of a letter on the letterhead of the Department of Law and Public Safety, Division of Motor Vehicles, Motor Vehicle Officer's report, and the only original, the only original in this folder is this letter on the same letterhead, subject, Thomas Palermo, and it sets forth the information relating to traffic summonses given Palermo for violating particular traffic regulations of the State of New Jersey.

If you will look at these two summonses which allegedly were given to Palermo on January 28th,

you will note that the information which is contained in People's 20 is all contained in these summonses. Now, the officer said that he went through the trouble of typing up this letter, and that letter he said was designed for his own records. Now, he did not have to do that. He had the copies of these summonses which were allegedly served, and those copies contain all of the information contained in this letter. And then strangely enough, he incorporates that letter with other copies of letters which he stated represent other types of infractions. In other words, infractions relating to false statements or violations of a similar type. Now, that is another unusual circumstance relating to Macaluso.

I hope you will pardon me for jumping all over the lot, but as I talk here and look at the evidence, I am reminded of other facets of this trial which I think deserve your attention.

Getting back to the local touch. The obvious presence in this picture, in the commission of this crime of a fingerman. The fingerman of course was not present in the house during the commission of the crime so that he could be seen. You will recall that --

Summation-People

MR. EVSEROFF: Your Honor, I am going to object to that. This is not an inference based on any testimony.

THE COURT: There is no evidence that there was any fingerman in this case. However, the objection is overruled. Counsel has a right to reason and argue, and that is what he is doing now. If the argument or reasoning does not meet with your approval, if it is not acceptable to you, reject it out of hand, Gentlemen.

MR. DI IORIO: Now, you will recall that the two perpetrators entered this home without masks. Their faces were exposed, and there appeared to be no fear on their part of detection by way of recognition, which might have been possible if they were two local individuals. Which fortifies the contention of the People that although the fingerman was in fact a local individual, because of the information which was obviously possessed by the perpetrators, the actual perpetrators could reasonably be assumed to have been outsiders who had no fear of being recognized during the course of the commission of this crime.

Mr. Smith brought out in his summation that if Giglio were not in jail, he would be seated in

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to be easily forgotten. And you have got to remember that the faces of these perpetrators, alleged perpetrators were seen physically by these two women within a month or five weeks after the commission of the crime. And to think that they would have forgotten, in a five-week period they would have forgotten the face, or the faces of the perpetrators of this crime, is incredible.

You will remember during the course of the trial when the two ladies testified, when Mrs. Bonopane was on the stand and I asked her to point out the defendants, there wasn't one ounce of hesitancy. She pointed out Palermo and she pointed out Saltzman without a question, and she said those are the two men who held us up on the 28th of January. And there wasn't any doubt about it. There wasn't a doubt that she expressed when she saw the photographs. When she saw the photograph of Palermo, she was ninety-nine per cent sure. But when she saw him in the flesh, she was positive that that was the individual.

If you look at their faces, look at Palermo's face and say to yourself, "Is that the kind of a face that would be easy to forget?" Look at Saltzman's face, if you could see him behind his attorney.

MR. SMITH: I will be glad to move.

(Mr. Smith changes location.)

MR. DI IORIO: Yes. Look at Saltzman's face. Say to yourselves, "Is that the kind of face that would be easy to forget?" Is that one of the faceless people who you sometimes see and they resemble nobody? These faces have definite characteristics, if you look at them. And it is fair to assume that these women who saw those faces under the circumstances described to you, will remember those faces as long as they live.

Now, Mr. Smith, at the completion of his summation, said to you Jurors that if your decision, if your verdict is not a proper verdict, and not consistent with the evidence, you will go through the rest of your life with the gnawing doubt that will haunt you for the rest of your life. Now, let me make a comment on that situation. If you Jurors are convinced beyond a reasonable doubt of the guilt of these two defendants, and you bring back a verdict of not guilty, you will go through life with same gnawing doubt that Mr. Smith refers to, if you find them guilty without good reason.

In other words, if you are convinced of the guilt of these defendants beyond a reasonable doubt, you must convict. In good conscience you must convict.

Summation-People

If you want to go through life without the gnawing doubt that Mr. Smith alluded to, I think it is your duty as Jurors to do the right thing, and if you are convinced beyond a reasonable doubt of the guilt of these two defendants, your verdict should be guilty as charged.

Thank you very much.

(Mr. DiIorio concludes at 2:38 p.m.)

THE COURT: Mr. Foreman and Gentlemen of the Jury, it is obvious that were the Court to commence its charge now, you would not begin deliberating in this case until close to four o'clock. That would be unfair and unreasonable. I also have in mind that one of your number must appear at school where he commences his studies at five or 5:30, for which reason he must leave here at 4:30. Therefore, we will recess now until tomorrow morning to reassemble here at ten o'clock promptly. I will charge you as to the law, and you will probably begin your deliberations at about 11:30. So that I will now recess until tomorrow morning at ten o'clock.

Please do not discuss the case among yourselves, form no opinions whatsoever. Do not let anyone talk with you about the case. Again I say, should you be reading a newspaper and should your attention be

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Statement of Case

Paster and two newspaper reporters. An examination of Wolff, White and Gaston and a further examination of Paster which they desire was properly denied them. Nothing that they might discover from White and Gaston could render the defendants' reliance upon their reports irresponsible or reckless. It would be futile, indeed, to allow them to interrogate Wolff or to question Paster further in the hope of getting them to change their well-documented stories.

The order appealed from should be affirmed, with costs.

Judges BURKE, BREITEL, JASEN, GABRIELLI, JONES and WACHTLER concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS PALERMO, Appellant.

Argued March 13, 1973; decided April 25, 1973.

Crimes — robbery — grand larceny — defendant, because of disruptive conduct during summation of prosecutor, was properly ordered gagged — trial court did not abuse discretion in method used in restoring order to courtroom.

Defendant, who was indicted with a codefendant for having bound, held at gun point and robbed two women in their home, was ordered gagged because of disruptive acts committed during the summation of the prosecutor. Defendant's actions constituted disruptive conduct, and subjected him to the possibility of sanction. In view of the warning given the defendant, the short duration of the gagging, and the prompt removal of the gag upon the defendant's concession to observe reasonable and responsible court procedures, the trial court did not abuse its discretion in the method used in restoring order to the courtroom. Defendant was not deprived of his right to counsel during the duration of the gagging. It was removed prior to the resumption of the court proceedings following the disruption. Furthermore, any objection to binding and gagging on the ground that it would carry some stigma of guilt, is not warranted where, as here, the jury knows the reasons for having the defendant restrained.

People v. *Palermo*, 36 A D 2d 1024, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 24, 1971, which affirmed a judgment of the Supreme Court (MICHAEL KERN, J.), rendered in Richmond County upon a verdict convicting defendant of the crimes of robbery in the first degree

(Penal Law, § 160.15) and grand larceny in the second degree (Penal Law, § 155.35).

Hyman Bravin for appellant. I. The physical restraint of the accused deprived him of a fair and impartial trial; compelled him to be a witness against himself; denied him his right to confer with counsel and restrained him of his liberty without due process of law. (*Illinois* v. *Allen*, 397 U. S. 337.) II. The gagging of appellant violated his rights against cruel and unusual punishment under Federal and State Constitutions.

John M. Braisted, Jr., District Attorney (*Norman C. Morse* of counsel), for respondent. I. The gagging of Palermo was justified by the circumstances and quickly ended his disorderly behavior. (*Illinois* v. *Allen*, 397 U. S. 337; *Chapman* v. *California*, 386 U. S. 18; *People* v. *Kingston*, 8 N Y 2d 384.) II. The gagging of defendant Palermo did not violate his right not to be subjected to cruel and inhuman punishment.

GABRIELLI, J. On asserted grounds of the violation of the due process clause of the United States Constitution and the claim of cruel and unusual punishment during the course of his trial on charges of robbery, first degree and grand larceny, second degree, the defendant seeks to have his convictions on these charges reversed. The trial followed his indictment, along with a codefendant, for having bound, held at gun point and robbed two women in their home.

Defendant's ground for reversal focuses on the order of the Trial Judge in directing that he be gagged because of disruptive acts committed during the summation of the prosecutor. Following several remonstrances, the court reporter noted that "(d)efendant Palermo confers with Mr. Evseroff [defendant's attorney] in audible tone", after which the minutes reflect that the following occurred:

"THE COURT: Just a moment, please. Now there must be absolute silence at the counsel table.

"DEFENDANT PALERMO: I can't talk to my lawyer? He is afraid of me here, I can't talk to my lawyer. I have to stand here and watch myself be framed?

"THE COURT: You will be bound and gagged if you continue. Now be quiet.

"DEFENDANT PALERMO: I don't want to sit here and be framed.

"THE COURT: You will be bound and gagged on one more outburst, Mister, one more.

"DEFENDANT PALERMO: You didn't give me a fair trial throughout the whole thing.

"THE COURT: Get a gag, will you please?

"DEFENDANT PALERMO: And you were a graft taker as a lawyer.

"THE COURT: Get a gag, please.

"DEFENDANT PALERMO: Get anything you want. I can't get a fair trial. You don't give my attorney half a chance.

"THE COURT: Mr. Foreman, Gentlemen of the Jury, please pay no attention.

"DEFENDANT PALERMO: Pay attention to everything that's prejudicial. You wouldn't even let me approach the bench when I wanted to talk to you.

"THE COURT: Gag the defendant.

"MR. EVSEROFF: If your Honor please, I respectfully except.

"THE COURT: You have an exception.

"(Accordingly, Defendant Palermo is gagged.)

"THE COURT: Now, I will remove that gag if he promises to be absolutely quiet. Counselor, it is your duty to ask him if he will be quiet, or does he prefer to remain gagged.

"(Mr. Evseroff confers with Defendant Palermo.)

"THE COURT: Is he going to coninue his outbursts, or will he be quiet?

"MR. EVSEROFF: If your Honor please, I respectfully object to this.

"THE COURT: You had your objection and your objection is overruled, Mr. Evseroff.

• • •

"MR. EVSEROFF: If your Honor please, I have another application. At this time I respectfully move for a withdrawal of a Juror.

"THE COURT: Motion is denied.

"MR. EVSEROFF: Respectfully except.

"THE COURT: Mr. Evseroff.

"MR. EVSEROFF: Yes, your Honor.

"THE COURT: Will you ask your client if he will be quiet and permit these proceedings to continue or does he intend to make gratuitous statements?

" (Mr. Evseroff confers with Defendant Palermo.)

" MR. EVSEROFF: He says, ' I'll be quiet,' Judge.

" THE COURT: All right. Please continue, Mr. Dilorio." (Assistant District Attorney.)

The gag was then removed and, although it is not expressly stated in the record, it is evident that its use was for no more than a few minutes.

We are, of course, mindful that courts must exercise every reasonable effort to protect against the loss of constitutional rights (*Johnson* v. *Zerbst*, 304 U. S. 458, 464), and of a defendant's right to be free of restraint during trial, in reasonable circumstances (*Illinois* v. *Allen*, 397 U. S. 337, rehearing den. 398 U. S. 915). However, we find defendant's arguments, attacking the constitutionality of the court's action in directing that the defendant be gagged, without merit. The preservation of order and dignity during a trial is, of course, vital to the proper administration of justice in our courts and this may not be impaired by the contumacious acts of a defendant.

The responsibility of guaranteeing that this atmosphere is maintained rests with the Trial Justice. The court's duty in relation to the proper means and guidelines to be followed in dealing with defendant committing disruptive acts during trial is governed by *Illinois* v. *Allen* (*supra*), where the Supreme Court concluded that " trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." Noting also the absence of a panacea for dealing with disruptive defendants, the court further observed that at least three constitutionally acceptable avenues exist, for dealing with defiant defendants: (1) bind and gag him; (2) cite him for contempt; (3) exclude him from the courtroom (*Illinois* v. *Allen*, *supra*).

It is not difficult to conclude that defendant's actions constituted disruptive conduct, and, therefore, subjected him to the possibility of sanction (cf. *United States* v. *Seale*, 461 F. 2d 345, 371; *In re McConnell*, 370 U. S. 230, 235, 236; *Commonwealth* v. *Snyder*, 443 Pa. 433; *People* v. *Mendola*, 2 N Y 2d 270). In view of the warning given the defendant*, the short duration of

* The majority in *Illinois* v. *Allen* (*supra*) did not specifically require that a warning be given prior to the imposition of each sanction but the concurring opinion of Justice BRENNAN contained dictum that an adequate warning would

the gagging, and the prompt removal of the gag upon the defendant's concession to observe reasonable and responsible court procedures, the trial court did not abuse its discretion in the method used in restoring order to the courtroom. Defendant also attacks the gagging as constitutionally objectionable on the theory that he was deprived of the opportunity to confront his accusers and that his right to communicate with counsel was abridged. It is significant here that defendant was not deprived of his right to counsel during the duration of the gagging. It was removed prior to the resumption of the court proceedings following the disruption. Furthermore, any objection to binding and gagging on the ground that it would carry some stigma of guilt, is not warranted in a situation as this where the jury is cognizant of the reasons for having the defendant restrained (cf. *Hernandez* v. *Beto*, 443 F. 2d 634; *United States* v. *Samuel*, 431 F. 2d 610; *Odell* v. *Hudspeth*, 189 F. 2d 300, cert. den. 342 U. S. 873).

We also take note of the court's adequate instruction to the jury that they disregard the incident and place no unwarranted inferences on it.

Such matters as court decorum rest clearly in the sound discretion of the trial court (*United States* v. *Roustio*, 455 F. 2d 366) and we uphold the exercise of the court's discretion in this case and add that, wherever practicable, sanctions directed for the maintenance of order should be imposed outside the presence of the jury. Here, the conduct, occurred during a crucial part of the trial and, in the circumstances of the case, the court had the inherent power to act immediately in order to guarantee the preservation of order and the proper continuance of the proceedings (*Johnson* v. *Mississippi*, 403 U. S. 212, 214; *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 463); and as suggested in *Illinois* v. *Allen* (397 U. S. 337, *supra*) once the goal of preserving order and decorum is achieved, every reasonable effort should be made (as was done here) to minimize the possibility of prejudice.

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be required (*Illinois* v. *Allen*, 397 U. S. 337, 350). Without deciding the question, it would seem advisable that, where practicable the defendant be warned that his conduct may result in the imposition of court sanctions (see *Jones* v. *State*, 11 Md. App. 686, wherein a warning was deemed necessary prior to having the defendant shackled and gagged).

Points of Counsel

Defendant's other contentions are insubstantial and do not rise to the level of error requiring a reversal.

Chief Judge FULD and Judges BURKE, BREITEL, JASEN, JONES and WACHTLER concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN V. COLCLOUGH, Appellant.

Argued March 21, 1973; decided May 2, 1973.

Crimes — assault — corroboration — where evidence sustained conviction for assault in second degree (Penal Law, § 120.05) and also indicated that defendant might have been guilty of sexual crime requiring corroboration (Penal Law, §§ 130.65, 130.15), holding in People v. Radunovic (21 N Y 2d 186), will not be extended to require corroboration of victim's testimony.

The evidence, which was sufficient to sustain the conviction for assault in the second degree (Penal Law, § 120.05), also indicated that the defendant might have been guilty of sexual abuse in the first degree (Penal Law, § 130.65), a crime which requires corroboration (Penal Law, § 130.15). The holding in *People* v. *Radunovic* (21 N Y 2d 186) will not be extended to require corroboration of the victim's testimony.

People v. *Colclough*, 39 A D 2d 882, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 22, 1972, which affirmed a judgment of the Supreme Court (BERNARD NADEL, J.), rendered in New York County upon a verdict convicting defendant of assault in the second degree.

Richard Steel for appellant. I. Failure to corroborate all the elements of the crime required a dismissal of the indictment. (*People* v. *Downs*, 236 N. Y. 306; *People* v. *English*, 16 N Y 2d 719; *People* v. *Young*, 22 N Y 2d 785; *People* v. *Lo Verde*, 7 N Y 2d 114; *People* v. *Romano*, 277 N. Y. 619; *People* v. *Perez*, 25 A D 2d 859; *People* v. *Masse*, 5 N Y 2d 217; *People* v. *Butt*, 35 A D 2d 585; *People* v. *Augustine*, 35 A D 2d 527; *People* v. *Colon*, 37 A D 2d 21.) II. An intent to commit the crime charged cannot be implied. (*People* v. *Osinski*, 281 N. Y. 129; *People* v. *Katz*, 290 N. Y. 361; *People* v. *Rytel*, 284 N. Y. 242; *People* v.

Docket 73 C 844 — HABEAS CORPUS — CLOSED — DOCLING, J. — SHEET 1

TITLE OF CASE	ATTORNEYS
UNITED STATES OF AMERICA ex rel. THOMAS PALERMO v3. HON. LEON VINCENT	For Plaintiff: Thomas Palermo #18024 Pro Se Drawer B - STORMVILLE, N.Y. 12582 LAWRENCE HOCHHEISER, ESQ. For Defendant 16 Court St. Brooklyn, N.Y. 11241 (Appointed by the Court) JAMES O. DRUKER, ESQ., (appointed by Court for relator herein) 600 Madison Ave., N.Y.N.Y. 10022 Tel: (212)-832-1024

BASIS OF ACTION:
(Related Case: 72-C-1267)

JURY TRIAL CLAIMED
ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
6-11-73	FORMA PAUPERIS	-	-								

UNITED STATES COURT OF APPEALS FILED AUG 1 1974 SECOND CIRCUIT

ABSTRACT OF COSTS			RECEIPTS, REMARKS, ETC.
TO WHOM DUE	AMOUNT		
			-

'13' A-78

73-C-844 U.S.A. ex rel. THOMAS PALERMO vs. HON LEON VINCENT

	FILINGS—PROCEEDINGS	AMOUNT RECEIVED IN CLERK'S OFFICE
6-11-73	PETITION FILED FOR A WRIT OF HABEAS CORPUS. Letter of relator herein filed dated May 21, 1973, etc.	1 & 2
6-11-73	BY DOOLING, J. ORDER TO SHOW CAUSE FILED (1) The Atty., Gen., State of N.Y. to show cause why a writ of habeas corpus should not be issued, etc. (See order)	3
6-11-73	Copy of letter of Clerk of Court filed dated June 11, 1973 addressed to relator herein re enclosure of a copy of order to show cause, etc.	4
6-25-73	BY DOOLING, J. ORDER FILED extending the respondent's time to reply to the petition herein to July 16, 1973, etc. (P/C mailed to attys.)	5
7-17-73	Affidavit of CONSTANCE B. MARCOLIN, Assistant Atty., Gen., State of N.Y. filed in opposition, etc.	6
8-6-73	By DOOLING, J.--Order dated Aug. 1-1973 filed. Ordered that petitioner's time to traverse the opposition be extended from 7-26-73 to and including 9-7-73 or alternatively that petitioner be allowed to withdraw this petition without prejudice to renewal.	7
9-17-73	BY DOOLING, J. ORDER FILED and affidavit of Thomas Palermo filed (attached) denying motion of relator herein and appointing LAWRENCE HOCHHEISER, ESQ. (16 Court St., Suite 1804) Bklyn.,N.Y.11211 as attorney to represent petitioner in this matter.	8
9-19-73	Copy 5 (VOUCHER re appointment, etc.) filed.	9
9-19-73	Copy 4" Mailed to Administrative Office, etc.	
11-2-73	Letter of LAWRENCE HOCHHEISER, ESQ., filed dated Nov. 1, 1973 addressed to DOOLING, J.	10
11-5-73	Copy 4 (appointment voucher) mailed out to Chief Auditor, etc.	
11-5-73	Copy 5 (appointment voucher) filed.	11
12-3-73	Brief filed in support of petition for a writ, etc.	12
12-18-73	Letter of James O. Druker, Attorney for Petitioner herein filed dated Dec. 17, 1973 addressed to DOOLING J. re supplement to petitioner's brief, etc.	13
1-16-74	Memorandum of Law filed in supportof motion, etc.	14
2-14-74	BY DOOLING, J. ORDER FILED. ORDERED that the petition for a writ of habeas corpus is DISMISSED and the writ is DENIED. (See Memo.,etc.)	15
2-21-74	VOUCHER (Copy 1) re payment to counsel mailed to Administrative Office, etc.	
2-21-74	VOUCHER (Copy 2) filed.	16

73-C-844 U.S.A. ex rel. THOMAS PALERMO vs. HON. LEON VINCENT

CIVIL DOCKET

"C" A-79

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
2-21-74	NOTICE OF APPEAL FILED.		17	
2-21-74	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A. mlb			
2-21-74	Copy of instructions on preparation of record on appeal mailed to JAMES O. DRUKER, ESQ., 600 Madison Ave, N.Y., N.Y. 10022 mlb			
2-28-74	BY DOOLING, J. CERTIFICATE OF PROBABLE CAUSE FILED, and GRANTED.		18	

A TRUE COPY
ATTEST
DATED March 7, 1974
LEWIS ORGEL
CLERK
Marie R. Barrett
BY DEPUTY CLERK

D. C. 110

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS PALERMO,

Petitioner,

- against -

LEON J. VINCENT,

Respondent.

73 C 844

MEMORANDUM and ORDER

Appearances:

JAMES O. DRUKER, Esq.
Attorney for Petitioner

BARBARA ANN SHORE, Esq.,
(HON. LOUIS J. LEFKOWITZ, Attorney General, and CONSTANCE E. MARGOLIN, Esq., of Counsel)
Attorney for Respondent.

DOOLING, D.J.

After a jury trial in the Supreme Court, Richmond County, petitioner was convicted of robbery in the first degree and grand larceny in the second degree, and on June 27, 1969, he was sentenced to imprisonment not to exceed 25 years in a State correctional facility. He was convicted with a co-defendant, Thomas Sheldon Saltzman. Petitioner's conviction was affirmed unanimously in the Appellate Division, Second Department, without opinion, 1971, 36 App.Div.2d 1024, and was unanimously affirmed in the Court of Appeals, 1973, 32 N.Y.2d 222.

The petition put forward three possible grounds for federal intervention. All arise on the record made in the State court, and they have not required an evidentiary hearing, nor has petitioner sought one. The points raised are: first, that the "in-court identification" by the two complaining witnesses was tainted when tested by Wade-Gilbert standards; second, that the prosecutor's summation deprived petitioner of a fair trial by its inflammatory and prejudicial nature; and, third, that the court's having the petitioner gagged briefly during the closing argument of the prosecution denied him a fair trial.

The People's case was that petitioner and Saltzman had gone together, after making a telephone appointment, on purported business to the house of Mrs. Eva Bonopane and Mrs. Lea Ariosta, sisters who lived together in Staten Island near a large gasoline service station which they owned and operated. Having gained admittance to the house, the charge was, petitioner and Saltzman proceeded to rob the women, Saltzman holding a gun on them while petitioner ransacked the house. The search unearthed several thousand dollars in cash and coins and some thousands of dollars worth of jewelry. The robbery took over an hour. Both complaining witnesses had ample opportunity to observe the petitioner and no genuine

identification issue existed in petitioner's case, whatever may be said of his codefendant. Both complaining witnesses were taken to Manhattan police headquarters within hours after the robbery and separately viewed a very large collection of photographs; at that time the police were impotent to suggest, select or point out because there were no suspects. Both women independently selected the photograph of Palermo, the petitioner, as one of the perpetrators, at the same time indicating that they could not be absolutely sure. After two incompletely evidenced episodes in which neither woman selected either petitioner or Saltzman as being among those present at two courthouse proceedings -- the evidence does not indicate that either petitioner or Saltzman was at either place to be selected -- the women again identified petitioner -- and Saltzman -- when they saw them emerge from an office building in Yonkers while they were there in a police vehicle for the very purpose of seeing if they could select the men they were accusing.

The trial court conducted a hearing, applied the appropriate constitutional rules to the evaluation of the testimony, and on ample evidence concluded that, whether or not there were improper showups, they had not tainted the genuine

identification derived from the women's actual experience of the robbery itself; simply, they knew that the petitioner was one of the men who had robbed them. The conclusion was inevitable on the evidence as to the petitioner, and it involved no transgression of any of his constitutional rights.

The trial in many ways was unsatisfactory. For reasons difficult to determine from the black and white record the trial atmosphere could not be kept steady and even.

The defendant Saltzman, putting up really only the issue of identification, took the witness stand and denied that he even knew petitioner at the time of the robbery in January of 1968, and, of course, denied the robbery. His counsel's summation claimed mistaken identity and he argued that the women had failed to pick out a picture of Saltzman from the police display on the day of the robbery, but that both had indicated that one Nicholas Giglio -- who had the best of alibis, for he was already in jail -- looked somewhat like the second robber. While the record is reasonably clear that neither woman said or meant that Giglio's picture was selected as that of the second robber but had said only that he was a person of that sort of appearance, counsel made what he could

out of the casual testimonial confusions. There was no evidence that Saltzman's picture was among those exhibited; it should not have been, for he had no record.

Petitioner's case by the time his counsel rose to close for him was an utterly impossible one. Not only was the identification evidence beyond doubting, but any hope of introducing a doubt had been destroyed by a disastrously unsuccessful attempt to prove an alibi (of which the People had not been given the required notice -- the Court nevertheless allowed the evidence). The proof was sought to be made through two witnesses, a policeman from New Jersey who testified that he had arrested petitioner and served two summonses on him in Lodi, New Jersey, at practically the moment of the robbery on Staten Island, and a diamond merchant and platinum ring-settings manufacturer, Rackover, who allegedly was with petitioner and sleeping on the back seat of the car when petitioner was arrested (the car was Rackover's car, allegedly being lent to the petitioner to drive from Long Island to Pennsylvania because petitioner wanted to visit his aunt). Petitioner's counsel summed up bravely but hopelessly on the alibi defense, and, on the issue of identification, exploited the supposedly suspicious "failure" of the officers who conducted the first

investigation, and who supervised the examination of the photographs at headquarters, to list as suspects or possible suspects either the petitioner or Giglio, when they made their report of the robbery still later on that day.

Defense counsel completed their summations about twenty to twelve. The District Attorney suggested that the jury be sent to lunch at that time and the Court did so over the objection of counsel for the defense who were insistent that the District Attorney be required to sum up at once. After the jury had been excused, petitioner's counsel renewed the exception with some insistence and the Court somewhat impatiently overruled the objection and at that time Saltzman's counsel disassociated himself from the objection.

The prosecutor stated that there was, of course, no question about the time of the crime and the fact that it had occurred. He then argued (Tr. 1191) that the method used by the perpetrators of the crime -- inferentially, as shown by the evidence -- "was a highly professional job. This was not a crime committed by novices. This was a crime committed by professionals in a highly professional manner." Then the prosecutor detailed the undenied evidence about the approach,

the appearance of the defendants in the guise of businessmen, their initiation of what seemed to be a business meeting, the sudden production of the gun, the use of rubber gloves, and the systematic search of the house until the several thousand dollars cash and some $10,000 in jewelry were located. The prosecutor referred to certain evidence indicating that there had been some reconnaissance, since the robbers seemed to know where the safe, etc., were. The prosecutor argued (Tr. 1197-1198) that a local individual had probably brought the two defendants, who lived in Queens, in on the robbery to avoid identification. Then the prosecutor proceeded to the evidence that the two detectives took the two women to police headquarters in Manhattan (Tr. 1198) "for the purpose of viewing photographs in what is commonly known as an M.O. file, modus operandi file." This reference to a modus operandi file at police headquarters went back to testimony brought out by petitioner's counsel on his cross-examination of the two detectives (Tr. 595-98, 697-98). One of the detectives testified (Tr. 697-98) that they had taken the two women to Manhattan

> "to what is called the modus uperandi file, on the fourth floor in Police Headquarters, Broome Street."

Petitioner's counsel inquired about the principle on which the pictures were selected for display to the two women, asking (Tr. 706):

> Q And were these pictures of people picked out in a certain manner? In other words, did these people have certain physical characteristics?
>
> A Yes, sir.
>
> Q Did these characteristics conform to what the ladies had earlier told you with respect to the characteristics of the alleged perpetrators of the crime?
>
> A It was the crime classification and physical description."

Counsel for Saltzman in his examination of the same detective (Tr. 725) referring to the examination of the pictures at Police Headquarters asked:

> Q And you made a preselection of how many files, you and your brother detectives?
>
> A Robbery classification only.

The prosecutor in his closing argument continued to outline the evidence, and, turning to the testimony of Macaluso, the policeman who claimed that he had arrested the petitioner in Lodi, New Jersey at the very time of the robbery, he attacked it root and branch. He characterized Macaluso's testimony (Tr. 1208) as a "strange fabrication of testimony" and

went on to say that

> " . . . there is always a question that the person who is offering the alibi might be wrong on the date or the time. But going back to my original assumption that this particular robbery was committed by professionals, you have the pat situation here of summonses being produced, allegedly served in Lodi, New Jersey, on a particular date, at a particular time. How pat can an alibi be?"

Arging that the production of summonses actually dated to the very hour of the robbery and presented by a policeman was simply too pat to be believed, the prosecutor continued (Tr. 1209)

> "Too pat, it is a situation which strikes me as just being too pat. And consistent with the type of a situation which you might consider contrived by professional robbers."

Anticipating the argument that the jury might present to itself that the alibi worked for petitioner only and did not cover Saltzman, the prosecutor continued by arguing that if the women's identification, clearer as to Palermo than as to Saltzman, was shattered by perfect alibi testimony (Tr. 1210) " . . . why, it would cast out upon the other identification as a matter of logic." The prosecutor went on,

> "So that when you think about the fact that they could have put Saltzman in the car, when you analyze it, that might have appeared too pat. And the reasoning on the part of a professional would be to work this thing out in such a way that it isn't too incredible."

Describing Macaluso's testimony as fantastic, the prosecutor invited the jury's attention to the fact that when he left the witness stand, Macaluso (Tr. 1210) "sat in the courtroom as an interested spectator, and it appeared to me that his interest in this trial went far beyond that of a simple alibi witness." At that point counsel objected that the comment was not fair and his objection was overruled. The prosecutor went on to argue that when the witness Rackover testified to his presence at the arrest, Macaluso's presence in the courtroom made it possible for Rackover to identify Macaluso, seated in the courtroom, from the witness stand (Tr. 1211). The prosecutor's attack on Rackover's testimony emphasized its many aspects of incredibility, and he argued that it implied a very close relationship between the petitioner and Rackover. He pointed out (Tr. 1214) that the charge was that Palermo committed the robbery, and, if that was shown beyond a reasonable doubt, he asked whether it was not "a strange thing that there should be a relationship between a man alleged to have committed a robbery involving the theft of jewelry and this

fellow Rackover, who was involved in the very same business? You will remember --" At that point petitioner's counsel objected and the objection was overruled. Pointing to the kind of jewelry business that Rackover was in, that is,a merchant of diamonds in one of the diamond exchanges with an adjunctive factory in which he manufactured platinum settings, the prosecutor continued (Tr. 1215),

> "Now, what more perfect compantion, what more perfect companion can a robber have than a man involved in that kind of business, where jewelry is stolen -"

Petitioner's counsel moved for a mistrial, and the motion was denied on the ground that the argument was one from the evidence which the jury was free to accept or reject. The District Attorney argued that the witnesses for the People were really not highly motivated to lie. Turning to Rackover and Macaluso, he argued that Macaluso had no motive to distort the truth unless it was possible (Tr. 1217) "that sometime after March of 1968 someone approached --". Petitioner's counsel at that point interrupted, objected and moved for a mistrial; the objection was overruled and the motion denied. The District Attorney continued, arguing that the strange circumstances surrounding the writing of the two allegedly falsified traffic

summonses led to the conclusion that (Tr. 1218) " . . . there is something rotten in the State of Denmark. Now what would be the purpose, what would be the motive behind these actions which are so highly suspect? Could it have been a payoff of some kind? Could he have been --". Defense counsel broke in, and again moved for a mistrial. The motion was denied, the Court saying that the District Attorney was presenting an argument suggesting possible motives for the police officer's conduct which the jury could infer from the evidence.

It was immediately in this context that the outburst and gagging incident occurred, which will be discussed later. After the gagging episode, the prosecutor resumed, turning his attention to Rackover, emphasizing the closeness of the friendship that the Sunday trip implied, and asking the jury to ask itself what Rackover's motives would be (Tr. 1222) "in trying to sell you a bill of goods." He concluded by suggesting, (Tr. 1223), "could it have been a profit motive?" Again there was an objection, which was overruled. The District Attorney then asked the jury whether it was not possible that petitioner was able to unload the loot from this job with a man like Rackover (Tr. 1224), "[a] perfect drop for fruits of a crime of this type." Petitioner's counsel objected

strenuously, arguing that there was no foundation in the evidence for such an inference. The objection was overruled and counsel's argument was rejected, while the jury was left clear in the idea that it was for it to determine whether to accept or reject the inference. The prosecutor, finally, referring to Saltzman's testimony that he had never met petitioner before the arrest, made the argument that there was evidence that, at least after their joint arrest, the two defendants had become friendly and their wives had become friendly. The prosecutor argued guilt of association from this, suggesting that if they had never met before, Saltzman, who had no criminal record whatever and a good employment record, would have fully withdrawn himself from petitioner and sought to disassociate himself from petitioner, particularly since the identification testimony was so manifestly weaker as to Saltzman. That he did not do so, the prosecutor argued, supported some sort of inference that actually the association was an older one than Saltzman claimed.

It will be seen, then, that the alibi testimony and the attack upon it, and in consequence the attack on the possible motivation of Macaluso and Rackover, was very important in the case. This was added to when the Court put

the matter in this perspective in its instructions on the alibi matter (Tr. 1306):

> "You may ask yourselves, was the witness or the witnesses who testified as to the alibi, in their recital of their testimony, were they accurate in every detail. Were they substantially in accord, were they too accurate, or were they inaccurate or evasive. That is your right, Gentlemen of the Jury. You have the right, in considering this testimony, to inquire whether or not there was any common, mutual interest among the alibi witnesses, which interest might affect them to the extent of creating or helping to create a false alibi. Or is their testimony prompted solely in their desire to assist in the true administration of justice, in order to vindicate an innocent defendant?"

And in the part of the instructions in which the Court marshalled the evidence, the Court stated (Tr. 1322-23), in speaking about the trip the two women made to Police Headquarters to review photographs,

> " . . . They said they went with the police to Criminal Identification File, the M.O. File at Police Headquarters, where they were shown about 500 photographs.
>
> * * *
>
> . . . In the Police Headquarters M.O. Unit, Mrs. Bonopane said she picked the photograph of the defendant Palermo. Mrs. Ariosta also said . . . she picked the photograph of the defendant Palermo. Each one separately told the police officers that a photograph of the man by the name of Giglio, while he was [redacted]

"not the man who committed the acts, while he was not one of the men, did have a hairline or a certain characteristic feature which resembled the hairline or a certain characteristic feature of the defendant Saltzman."

In this total setting it will be seen that the repeated references to the professionalism of the job and the repeated appeals by the District Attorney to the jury to consider the supposed expertise shown in the perpetration of the robbery, was necessarily an insistence that Palermo at least was a known robber with a modus operandi who was at minimum known to the police, had very likely been arrested, and had probably been involved in a robbery characterized by some comparable modus operandi. The People did not present the photographic pickout as part of their direct identification testimony. After a perfunctory effort to avoid spelling out the meaning of M.O., no effort was really made by defense counsel to prevent the police officers from describing explicitly the circumstances of the visit to headquarters or the nature of the photograph group that was presented to the witnesses. After the first mention, neither defense counsel, who opened the matter up, nor the Court, nor the prosecutor seemed at all to avoid explicit mention of what ordinarily would be a matter of prompt and strenuous objection. That is instanced by the

objection that was promptly made to Saltzman's testimony of an ambiguous sort -- that he and the petitioner had met for the first time on the occasion of their joint arrest sometime in February, whereas apparently the arrest in the case on trial did not occur until March. There was great objection to this testimony, and the Court adroitly headed it off in order to avoid precisely the implication of prior arrest on another crime which the testimony about the trip to headquarters so richly and pointedly furnished.

Nor could there be much doubt that in the State Court, as in this, the matter, if objected to at trial and raised on appeal, would have resulted in a reversal. See People v. Williams, 2d Dept. 1972, 39 App.Div.2d 970; cf. People v. Meckler, 1963, 13 N.Y.2d 168. Compare United States v. Harrington, 2d Cir. Dec. 28, 1973, slip op. 1007. The explanation for the freedom with which the jury were allowed to realize that petitioner's picture was in a police modus operandi file for accused or convicted robbers appears to lie in petitioner's hopeless identification situation: he had to attack the showing of the photographs somehow. The Wade hearing, not in the jury's presence, had familiarized Court

and counsel with all of the materials, and, apparently, it did not occur to anyone to devise and persist in some means of making the comparison procedure neutral in tone without handicapping cross-examination. None of the references to "professionalism" in the summation of the prosecutor was, therefore, objected to by defense counsel, although he was nothing loath to object strenuously when occasion demanded.

Treating the remarks made in the summation together with the M.O. file evidence and the remarks included in the Court's charge as exposing petitioner to a plain inference that he was a robber with a modus operandi known to the police, it nevertheless cannot be said in the very special circumstances that there was a transgression of fair trial standards of constitutional dimensions. People v. Williams and People v. Meckler, and United States v. DeCicco, 2d Cir. 1970, 435 F.2d 478, and United States v. Harrington, condemn as fundamentally unfair such introduction, in whatever form, of evidence of other crimes not otherwise relevant and competent, but that objection was not by the end of the trial, and is not at this point, available to petitioner. Certainly if it could have been raised after verdict and despite the want of an objection in the State Court, it cannot be treated as a

constitutional violation open to challenge collaterally in the federal court after unanimous affirmances of the verdict and judgment in the State Courts. Cf. Buchalter v. New York, 1942, 319 U.S. 427, 431; United States ex rel. Castillo v. Fay, 2d Cir. 1965, 350 F.2d 400, 401; contrast United States ex rel. Haynes v. McKendrick, 2d Cir. 1973, 481 F.2d 152, 159-161.

The gagging issue raises questions of a somewhat although not entirely different sort. The interruptions that led up to the explosion came at the part of the People's summation in which the assistant District Attorney was dilating on the improbabilities implicit in Rackover's testimony about his willingness to lend his car and himself to petitioner's request that he be driven to Pennsylvania to see his aunt on a Sunday, Rackover's only day off, and a day on which he was feeling unwell because of a virus attack. (Tr. 1213) The assistant District Attorney then made the argument that if it was shown that petitioner was a jewel robber in the case before the jury, there would be strangeness in a jeweler's having a relation to a jewel robber. What next occurred can only fairly be presented by a reading of the record of that part of the trial, and the pages involved (Tr. 1214-1226) are attached

as Annex A. It will be seen from the transcript that the argument of the assistant District Attorney, repeatedly objected to unsuccessfully, amounted to inviting the jury to believe that the Macaluso - Rackover testimony was so utterly incredible that the jury could fairly infer that the defendant had arranged for it, and in the case of Rackover the argument suggested that he, a jeweler, was a fence for petitioner, a jewel thief, and was ready to testify for his supplier. Without rehearsing in detail the Macaluso - Rackover testimony, it must be said that few could believe it; intrinsic incredibility is written all over it. While petitioner's counsel had done his best in his summation to paper over the ruinous cracks that appeared in it through the cross-examination, and, indeed, which appeared almost of necessity from the direct testimony itself, the feeble structure of it was in collapse under the assistant District Attorney's excoriation in his closing argument. It could not have been easy for petitioner or his counsel to see the escape rope the testimony was meant to supply turned into a noose for the petitioner, and to find the Court sustaining the right of the assistant District Attorney to impress upon the jury the conclusion that not only was the alibi false, but that, if

false, it had been suborned by the defendant, and put his guilt beyond peradventure.

As appears, (Tr. 1219) petitioner spoke to his counsel, the Court heard his voice, stopped the District Attorney, and commanded "absolute silence". Petitioner's outburst, the gagging, and the removal of the gag followed. There were no further outbursts, but, as reference to the transcript and to the Annex shows, the objections by counsel to the District Attorney's argument were continued. Counsel were neither cowed nor dissuaded from the precise line of objection that had occasioned the outburst.

As the Court of Appeals has recently pointed out, it is enormously difficult to recapture the precise atmosphere of a trial or the effect of matter appearing in the record on the tone, tendency, and outcome of the proceeding. See United States v. Weiss, 2d Cir. 1974, slip op. 1463, 1476-1480. Here, when the outburst occurred, the trial was nearing its end, the summation by the People was critically important to the petitioner and his codefendant, and the trial judge was right to take drastic action. He did not have the advantage of the later decision of Illinois v. Allen, 1970, 397 U.S. 337,

reversing United States ex rel. Allen v. State, 7th Cir. 1969, 413 F.2d 232, 235, which had held that, rather than deny a defendant his right of confrontation

> "The proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged."

United States v. Bentvena, 2d Cir. 1963, 319 F.2d 916, 930, had sanctioned, although in the case of outrageous defendant behavior of a calculated and degrading sort, the gagging and shackling of some of the defendants. While Allen disapproved of the gag as a preferred resort against the unruly defendant (397 U.S. at 344), it did not disapprove of it as a licit expedient of occasional resort. The ABA Advance Report on The Standards Relating to the Judge's Role in Dealing with Trial Disruptions, Par. C.1, treating the removal of the defendant from the courtroom as to be preferred over gagging or shackling, and repeating Allen's qualified disapproval of gagging as a preferred means of constraining obedience to the court's directions, was not published until May, 1971. Even then it did not suggest that there is no place for the gag. The ABA monograph on The Function of the Trial Judge, published in 1972, incorporated in Par. 6.3, the text of Par. C.1 of the Advance Report without change. Allen was

discussed at length in The Supreme Court, 1969 Term, 1970, 84 Harv.L. Rev.1, 190-100, and the comment voiced doubt and misgiving about the boundaries of the problem, the permissible range of solutions, and the dilemma presented by the unruly defendant in his effort to defeat fair trial or to protest an unfair trial by useless and inadequate means.

It is easy to infer in the present case that the Court did not expect to have to carry out its threat, or act upon its warning -- if it was a warning rather than a threat. Had that been its expectation, it certainly would have excused the jury. It is, however, of importance to notice that no step in the case was actually taken during the brief time while petitioner was gagged. The period during which petitioner was gagged was fully occupied by colloquy between the Court and petitioner's counsel, at the end of which, when the petitioner indicated that he would comply with the Court's direction, the gag was removed and the prosecution continued with its closing argument.

The New York Court of Appeals carefully reviewed the question of fairness with very particular reference to the gagging episode. It fully recognized the applicability of

Allen and the standards which, although some time after the trial, Allen enunciated. The unanimous Court concluded that there was no ground for reversal. It cannot be said that the conclusion arrived at in petitioner's trial and in his appeals in the New York courts reflects any deprivation of the defendant's Fourteenth Amendment rights to due process.

Accordingly it is

ORDERED, that the petition for a writ of habeas corpus is dismissed and the writ is denied.

Dated: Brooklyn, New York
February 14, 1974.

U. S. D. J.